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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL,

ON APPEAL FROM THE SUPERIOR AND COUNTY
COURTS—APPEALS IN INSOLVENCY—
AND ELECTION CASES,

BY

J. STEWART TUPPER,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

VOL. II.

CONTAINING THE CASES DETERMINED
FROM THE 27TH JUNE, 1877, TO THE 4TH MAY, 1878
WITH A TABLE OF THE NAMES OF CASES ARGUED,
A TABLE OF THE NAMES OF CASES CITED,
AND A DIGEST OF THE PRINCIPAL MATTERS.

TORONTO:
ROWSSELL & HUTCHISON.

1878.

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QUEBEC, APPEALS IN EQUITY
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J. STEWART TUCKER
BARRISTER-AT-LAW AND COUNSELLOR AT LAW

ROWSELL AND HUTCHISON, LAW PRINTERS, TORONTO.

VOL. II.

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FROM THE 2ND TERM, 1871, TO THE 2ND TERM, 1872
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AND A INDEX OF THE SUBJECTS MATTER

TORONTO:

ROWSELL & HUTCHISON

1873

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OF THE
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

THE HON. THOMAS MOSS, C. J. A.

“ “ GEORGE WILLIAM BURTON, J. A.

“ “ CHRISTOPHER SALMON PATTERSON, J. A.

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REPORTS OF CASES

IN THE

COURT OF APPEAL.

Re SILVER, AN INSOLVENT.

Insolvent Act, 1875—Assignee's costs.

After a deed of composition and discharge had been agreed upon, but before it was actually executed, the assignee, at the request of the inspectors, surrendered the estate to the insolvent, but never re-conveyed it. The insolvent afterwards refused to pay the assignee's fees in the insolvency proceedings, whereupon the assignee petitioned the Judge for an order on the insolvent to pay, and in default for permission to resume possession of the estate.

Section 49 of the Insolvent Act of 1875 provides that in every case a deed of composition shall be on condition, whether the same be expressed or not, that if the same be carried out the insolvent shall pay the costs in the insolvency proceedings, including those for the confirmation of such composition.

Section 59 declares that the composition may be either payable in cash or on terms of credit, and the payment secured or not, according to the pleasure of the creditors signing it, and the discharge, either absolute or conditional, upon the condition of the composition being satisfied; and if the discharge be conditional, upon the composition being paid, and the deed of composition and discharge should cease to have effect, the assignee shall immediately resume possession of the estate.

Held, affirming the judgment of the County Court Judge, that under sec. 59 the assignee has no power to resume possession of the estate, except upon default in payment of the composition, where such payment is a condition precedent to the discharge.

Semle, that sec. 118 has reference only to costs of proceedings worked out in insolvency; but that if it applied here the assignee had lost his lien by parting with the possession.

Appeal from the County Court of the County of Wentworth.

The insolvent, Mary Silver, made an assignment to Alexander Davidson, an official assignee, on the 12th June,

1875, in pursuance of a demand made for that purpose under the Insolvent Act of 1875. At a meeting of creditors, duly called, Davidson was appointed assignee to the estate. Shortly afterwards a deed of composition and discharge, purporting to be made under the Insolvent Act of 1869, which had been repealed, was executed by the insolvent and the requisite proportion of creditors in number and value. After the terms of the composition had been agreed upon, but before the actual execution of the deed, Davidson, at the request of the inspectors of the estate, surrendered to the insolvent the stock in trade, which he had previously seized, but he never reconveyed it to her. Davidson's fees in the insolvency proceedings were taxed in January, 1877, at \$100, but the insolvent refused to pay them; whereupon Davidson placed his bailiff in charge of the insolvent's store. He seized goods which she valued at \$2,000, and held them for some time as security for the payment of his costs; but on being served with a notice by the insolvent of the illegality of his proceedings, he redelivered the stock to her and withdrew the bailiff.

Davidson then presented a petition to the learned Judge of the County Court, stating that the deed had never been confirmed, and asking him to make an order allowing him to resume possession of the estate and effects forthwith, and that she might be ordered to pay him the above costs, and the costs of the application, within one week; and that in default the deed of composition and discharge might be cancelled, and the petitioner allowed to resume possession of the estate, and that he might be allowed to sell a sufficient amount thereof to pay the \$100 and costs of the application, or that the insolvent might be ordered to deliver up to him the assets of her estate, or a sufficient portion thereof which, on a sale, would realize sufficient to pay him the said sum.

The learned Judge dismissed the petition with costs.

The petitioner appealed.

The following were the reasons of appeal:—

1. That the said Judge should have made an order, as

prayed for, ordering the said insolvent to pay to Alexander Davidson the said sum of one hundred dollars and costs, and, in default thereof, that the said Alexander Davidson should be at liberty to resume possession of the estate and effects of the said insolvent, or such a portion as, upon sale, would realize to the said Davidson the said sum, with costs.

2. That the said insolvent should have been ordered to deliver up to the said Alexander Davidson the assets of her estate in her possession, or such a portion thereof as would, upon a sale, realize sufficient to pay to the said Alexander Davidson the said sum with costs.

3. That in default of payment of the said sum of \$100 and costs, the said deed of composition and discharge should have been ordered to be cancelled.

4. That the said Judge should have ordered the said Mary Silver to pay the said Davidson the said sum of \$100 and costs.

The case was argued on the 29th May, 1877, before Burton, J. A., sitting alone.

Walter Cassels for the appellant. It is provided by the 49th section of the Insolvent Act of 1875 that it shall be a condition of every deed of composition and discharge that the insolvent shall pay the costs incurred in insolvency, including those for the confirmation of the composition. In default of this condition being carried out, the 59th section authorizes the assignee to resume possession, and the parties are remitted to their original position. Under sections 43 and 118 the assignee has an express lien on the estate for his costs. He has not reconveyed the estate under the Act, nor can he be compelled to do so until these costs are paid; he merely gave up possession of the stock, to enable the insolvent to continue the business. The learned Judge of the County Court was of opinion that, having parted with the estate, the lien which the Act confers was lost, but such could not have been the intention of the Legislature, as under the 60th sec-

tion the insolvent is obliged to convey the estate as soon as the deed of composition and discharge has been executed; and if the rule be as stated by the learned Judge, the assignee would have no means of enforcing the lien which the statute gives him for his costs in connection with the confirmation. He referred to *Re Botsford*, 22 C. P. 73; *Newhall v. Vampraugh*, 22 W. R. 377; *Re Hatton*, L. R. 7 Chy. 723.

E. Martin, Q. C., for the respondents. The condition in the deed which provides for the resumption of possession by the assignee does not refer to the costs, which are mentioned in the 49th section, but to the due payment of the composition, where the discharge is conditional upon the payments being made. It is a provision solely for the security of the creditor; and it could never have been intended to confer such a power on the assignee to enable him to make his costs. The 60th section must be read in connection with the well-understood rule, that a trustee is entitled to be paid all his costs before giving up the estate. The assignee voluntarily surrendered the estate and the lien is gone. The costs referred to in the 118th section are not those of a composition, but where the estate is wound up by the assignee. This application was altogether unnecessary, as an order could have been obtained from the County Judge for the payment of these fees, on which the assignee could have issued execution.

June 6, 1877. BURTON, J. A.—The deed of composition in this case, which was made on the 10th July, 1876, purports to be made under the Insolvent Act of 1869, which had at that time been repealed, but the deed may, I suppose, be read as made under the Insolvent Act then in force, *viz.*, the Act of 1875. The application, which has given rise to this appeal, is founded upon the 49th and 59th sections of the latter Act, the first of which provides that in every case a deed of composition shall be *on condition*, “whether the same be expressed or not, that if the same be carried out, the insolvent shall pay the costs in insolvency, including

those for the confirmation of such composition." The other (59th) provides that the composition may be either payable in cash, or on terms of credit; and the payment secured or not according to the pleasure of the creditors signing it, and the discharge either absolute or conditional, *upon the condition of the composition being satisfied*; and it then proceeds, that if the "*discharge* be conditional upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the assignee shall immediately resume possession of the estate and effects of the insolvent, in the state and condition in which they shall then be." The clause then provides that a *bonâ fide* purchaser's title shall not be affected, and then goes on to deal with the disposition to be made of the assets which shall then come into the hands of the assignee, declaring that creditors who have become creditors subsequently to the deed of composition shall rank *pari passu* with the original creditors, computing their claims as the balance remaining due on the composition; but after the subsequent creditors have received dividends to the amount of their claims, then the original creditors shall have the right to rank for the entire balance of their original claims then unpaid. In other words, after the subsequent creditors have, ranking with the reduced claims of the original creditors, been paid in full, the original creditors are remitted to their original rights and entitled to claim the full balance due to them.

Mr. Cassells cited several cases to shew that under the Bankruptcy Acts in England, as at Common Law, if the terms of the composition deed are not pursued by the debtor, the creditor is remitted to his original rights and remedies which, but for the interposition of the composition deed, he would have had throughout.

No doubt that would be so also under our Insolvency Act where the deed is silent upon the subject, but it expressly provides that the discharge may be absolute or may be conditional, on the condition of the composition being satisfied. The following words of the section are

not as clear in their meaning as one might desire: "if such discharge be conditional, upon the composition being paid, and the deed of composition and discharge therein contained should cease to have effect, the assignee shall immediately resume possession," but the meaning I take to be this: that if, by the terms of the deed, the creditors have not agreed, as they might do, to accept the agreement or security in satisfaction of their debts, but have stipulated that the actual payment of the composition shall be a condition precedent to their satisfaction, then, upon default, the discharge would cease to have effect; and in that event, the statute gives the additional right to resume possession. If the security is relied upon and accepted in satisfaction, the original debt is gone; if from the whole instrument it can be gathered that actual payment was a condition precedent to the discharge becoming operative, then, in addition to the debt reviving, the assignee is empowered to resume possession.

The counsel for the appellant, as I understood his argument, founds his claim upon these grounds:

1st. That by the terms of the Act the costs are made a first lien or charge upon the estate of the insolvent.

2nd. That under the 49th section, which I have quoted, the composition and discharge is conditional upon the costs being duly paid, and

3rd. That these terms being imported into the deed, whether expressly stated in it or not, the assignee is entitled, on the condition being broken, to resume possession.

As to the first point, I incline to think that the 118th section has reference only to the costs of proceedings worked out in insolvency, and not to cases of this kind, where the estate is removed from the court, and transferred to the insolvent; but even if the section applies, I am aware of no rule of law which would enable the assignee to assert a lien after parting with the possession, and was referred to no authority to shew that a statutory lien would stand on any different footing in this respect from one acquired by usage or express contract.

Upon the other questions, I assume that the deed of composition may be read as if these words had been contained in it, *viz*:

“ But this deed is made and executed upon the express condition that if the same be carried out the insolvent shall pay the costs incurred, including those for the confirmation thereof.”

As already intimated, the statute provides that the discharge contained in the deed may be absolute or may be conditional upon the condition of the composition being satisfied; and if the payment of the composition is made a condition precedent, and the deed, by reason of default in payment, ceases to have effect, the assignee is entitled to resume possession. In the present case the creditors have agreed to accept the secured composition in actual satisfaction of their claims, and have given an unconditional release, save only as qualified by the condition as to costs, and the case differs in that respect from the cases referred to by Mr. Cassels. As I read the 59th section, the discharge not being conditional on the payment of the composition, the right to resume possession under this deed cannot arise, as that is the only condition mentioned in the statute a breach of which authorizes a resuming of possession.

The insolvent will be unable to obtain a confirmation of her discharge until these costs are paid, but I do not think that a mere non-compliance with the condition places it in the power of the assignee to resume possession.

I should have been pleased if I could have seen my way to assist the assignee in recovering his costs, which he might have compelled the insolvent to pay before re-delivering the property, an act of consideration on the part of the assignee which has not been properly appreciated, but I am constrained to affirm the decision of the learned Judge in Insolvency, and dismiss the appeal, with costs.

Appeal dismissed.

WILDS ET AL. V. SMITH.

Sale of goods—Acceptance—Rescission—Stoppage in transitu.

The plaintiffs, merchants in New York, sold to E. B. & Co., merchants in Toronto, through the intervention of a broker, one O., 50 bags of coffee, on the 4th January, 1876, at sixty days' credit. The coffee was selected by O., after full opportunity of inspection and examination, and was sent by rail to Toronto, at the risk of E. B. & Co., who paid the freight thereon, and, on arrival of the goods, entered and bonded them in their name. Upon examination, E. B. & Co., ascertained, that, with the exception of fifteen bags, the coffee was badly stained with some chemical substance, and, on the 17th January, informed O. that it was unmerchantable, and asked him to see the sellers and let them know what to do, as they could not use it. O. replied that the plaintiffs repudiated all liability, but he suggested an experiment to get rid of the damage, and requested them to telegraph him if they could use the goods at $\frac{1}{2}$ per cent. per pound allowance, offering to endeavour to induce the plaintiff to make that reduction. E. B. & Co. replied that there could be no doubt the damage was an old one, but that they would call in a coffee roaster to inspect it, and if anything could be done they would communicate without delay. On the 7th February, and before O.'s suggestion was acted upon, E. B. & Co. made an assignment in insolvency to the defendant, having in the meantime sold 23 bags of the coffee, 15 before and 8 after the objection had been made to it.

Held, reversing the judgment of the Queen's Bench, 41 U. C. R. 136, that the selection of the goods by O., acting either for E. B. & Co., or for both parties, passed the property to E. B. & Co., and that they could not reject it after a full and fair opportunity of inspection by their agent.

Held, also, that even if E. B. & Co. had been at liberty to rescind the contract on ascertaining that a portion of the goods were unmerchantable, they had precluded themselves from so doing by the mode in which they had dealt with them.

Held, also, that even if the correspondence with O. had taken place with the plaintiffs, there was no evidence of a mutual rescission of the contract.

Held, also, following *Wiley v. Smith*, 1 App. R. 179, that the *transitus* was at an end; and that the right to stop being once lost could not be revived by a subsequent refusal of the consignee to accept a portion of the goods.

THIS was an appeal from the judgment of the Court of Queen's Bench, affirming the decision of Galt, J., (sitting out of term) on a special case stated for the opinion of the Court, reported 41 U. C. R. 136, where the facts sufficiently appear.

The appellant's reasons of appeal were:—

1. The contract of sale was entire and complete, and

acceptances were given for the price, and it was intended to and did pass to Bendelari & Co. the property in (50 bags) the entire quantity of which there was a receipt, acceptance and possession by Bendelari & Co., with the intention of taking possession as owners.

2. The contract was made with the plaintiffs through J. W. O'Shaughnessy & Co., as agents for Bendelari & Co.

3. The shipment from New York was at the risk of Bendelari & Co., and the plaintiffs were not liable for the deterioration of the coffee (if any) if it resulted from the transit: *Bull v. Robison*, 10 Ex. 342.

4. Prior to objection the property had passed to Bendelari & Co., and there had been an acceptance by them; they had lost the right to rescind the contract, and had precluded themselves from rejecting the 35 bags, by having received, assumed dominion and exercised acts of ownership over the entire quantity purchased: *Street v. Blay*, 3 B. & Ad. 456; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Cutter v. Powell*, 2 Smith's L. C., 7th ed., p. 1; *Castle v. Swoorder*, 29 L. J. Ex. 235, 30 L. J. Ex. 310; by having dealt with the invoice as their own, and having entered and bonded in their own names the entire quantity: *Tower v. Tudhope*, 37 U. C. R. 200; *Meredith v. Meigh*, 2 E. & B. 368; after full and fair opportunity was afforded of inspecting and examining it for the purpose of ascertaining if it was the proper quantity, quality, or description: 31 Vic. ch. 76, secs. 49, 55, sub-sec. 2, 4; 31 Vic. ch. 7, sec. 17, D.; by having sold and delivered a large portion (15 bags) to sub-purchasers, Par. 3 of case; *Chaplin v. Rogers*, 1 East 192; *Parker v. Palmer*, 4 B. & Al. 387; *Morton v. Tibbett*, 15 Q. B. 428; *Hunt v. Hecht*, 8 Ex. 814; *Currie v. Anderson*, 2 E. & E. 592; *Hammond v. Anderson*, 1 B. & P. N. R. 69; *McMaster v. Gordon*, 20 C. P. 17: by having failed to reject and return within a reasonable time, (the purchase was on the 4th, the arrival on the 12th, the bonding on the 13th, and objection did not reach its destination until the 20th); and by having put it out of their power to replace the plaintiffs *in statu quo*.

5. The sale by Bendelari & Co., after objection, of eight bags of the portion objected to, (par. 3 of case) waived their right to retract the acceptance or to insist upon the alleged rejection : *Chapman v. Morton*, 11 M. & W. 534 ; *Harnor v. Groves*, 15 C. B. 667.

6. The letter of objection did not, in its terms, answer the requirements of the law for effecting a rescission of the contract, or a rejection of the coffee, so as to revest the property : See *Couston v. Chapman*, L. R. 2 Sc. App. 250, per Lord Chelmsford. The coffee was then bonded in Bendelari & Co.'s name, and objections to a portion of it as being damaged gave the plaintiffs no rights against the Customs.

7. Neither party can rescind an entire contract in part and enforce it in part. Bendelari & Co. had no right to reject the alleged damaged coffee and retain the undamaged : *Cawston v. Chapman*, L. R. 2 Sc. App. 250 ; *Bigg v. Whisking*, 14 C. B. 195 ; *Morgan v. Bain*, L. R. 10 C. P. 15, per Brett, J. ; *Morse v. Brackett*, 98 Mass. 207 ; *Dorr v. Fisher*, 1 Cush. 274. If the property passed and possession was taken, Bendelari & Co. could not reject on the ground of a portion being damaged.

8. There was no rescission of the contract by mutual assent, nor was there acquiescence in the alleged rejection. Instead of assent to the objection, there was an express repudiation by the plaintiffs, who "declined to have any thing to do with it, as they say they were not aware of anything being the matter with the goods." The proposition to call in a coffee roaster shews that no mutual conclusion had been arrived at.

9. There was no negotiation by the plaintiffs for a reduction in price. The suggestion as to an allowance proceeded from Bendelari & Co.'s agents, who said :—"We have no doubt but what you can use the goods at half a cent per pound allowance, which we shall try and get you." No inference of assent and adoption by the plaintiffs arises in the face of their express denial and repudiation.

10. The suggestion as to reduction in price, if held to

bind the plaintiffs, is not consistent with an assertion that they treated the contract as annulled: *Bingham v. Mulholland*, 25 C. P. 227, per Draper, C. J.

11. There was no subsequent assent or acquiescence on the part of the plaintiffs. Bendelari & Co.'s assignment took place, and their assignee had claimed the coffee from the customs, prior to the notice of stoppage: Par. 7 of case. The fact of the plaintiffs having given that notice is inconsistent with the plaintiffs' assertion of ownership in the 35 bags. In exercising the right of stoppage, the vendor does not take possession of the goods as his own, but as the goods of the purchaser on which the vendor has a lien: *Benjamin on Sales*, 1st Am. ed., 757.

12. *Nicholson v. Bower*, 1 E. & E. 172, was the case of a prompt refusal to receive or accept the entire subject matter of a verbal agreement, while it still lay in the possession of the carrier, and the decision was based on that refusal. In *Boulton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431, there was a refusal to receive or accept on arrival, and notice of stoppage given to the carrier who had possession.

12. When the coffee was entered and bonded by Bendelari & Co. in their own names and in their bonded warehouse, the transit ceased: *Wiley v. Smith* (in Appeal), 1 App. R. 179.

13. At the least the defendant is entitled to succeed as to the eight bags of the portion objected to, which were sold after objection.

The following were the respondents' reasons against the appeal:—

That the goods in question never were the property of the vendee, for they themselves so declared in their letter dated the 17th of January, 1876. They therefore never were the property of the assignee in insolvency of the vendees.

The vendees having immediately before their insolvency declared they were not their goods, cannot be admitted immediately afterwards to declare that they were; nothing

in the interim having occurred to change the property therein.

The vendees having repudiated the goods as not having been such as they purchased, asked the vendors for directions as to what to do with them, thereby in the clearest possible manner admitting title in the vendors. After this repudiation and admission of title, the vendors offered to sell the goods to the vendees at a certain price. Before the acceptance or rejection of this offer by the vendees they became insolvent. Then the goods were the property of the vendors. The assignment to the assignee did not divest the title in the goods from them.

The respondents rely upon the authority of the judgment of Galt, J., in this case, and authorities therein referred to; also the judgment of Morrison, J., and Harrison, C. J., in appeal from the said judgment of Galt, J., and the authorities in those cases cited or referred to.

The case was argued on the 20th June, 1877 (a).

W. A. Foster, for the appellant.

J. O'Donoghue, for the respondents.

The arguments and cases cited fully appear in the reasons for and against the appeal.

June 27th, 1877 (a). BURTON, J. A., delivered the judgment of the Court.

This case does not depend on the question of the right of stoppage *in transitu*. The goods had arrived at their destination and been warehoused for duties by the consignee, and under the authority of *Wiley v. Smith*, 1 App. R. 179, decided by this Court, and affirmed by the Supreme Court, the *transitus* was at an end. That right to stop once ended could not be revived by the subsequent refusal of the consignees to accept a portion of the goods, by reason of their not being merchantable or saleable under the description contained in the contract of purchase.

(a) *Present*.—BURTON, PATTERSON, MOSS, J.J.A., and PROUDFOOT, V.C.

The goods in the present case were purchased through the intervention of a broker, one O'Shaughnessy, who acted as agent for Bendelari & Co., the insolvents, and who on their behalf, as I read the correspondence, selected the fifty bags which formed the subject of the contract, and shipped them to the insolvents. It was contended by the insolvents' counsel that O'Shaughnessy was the agent of the vendors. It is not so stated in the case, nor should I gather that to be the fact from the papers in evidence; but whether he was so or not, he was clearly acting in the matter of this purchase for Bendelari & Co., and the selection by him, acting for both parties, converted that which before was a mere agreement to sell into an actual sale, and the property thereby passed, and was shipped, as the case admits, at the risk of the insolvents; and if that be the correct view of the evidence, the sale was of the specific fifty bags so selected, and the insolvents had no right to reject them, their agent having selected them after full and fair opportunity of inspection and examination, for the purpose of ascertaining if it complied with the description of the article contracted for.

But assuming that O'Shaughnessy was not acting as Bendelari & Co.'s agent in selecting the goods, and that they were at liberty to reject them on ascertaining that a portion of them were injured to such an extent as to be unmerchantable, they precluded themselves from doing so by the mode in which they dealt with them. In addition to the sale of the fifteen bags which, it is admitted, were in accordance with the contract, they sold eight bags of the remaining thirty-five which they claimed to be damaged. It was one entire contract for fifty bags, and it was not, in my opinion, open to the insolvents under the circumstances admitted here to reject a portion; and the learned counsel for the plaintiffs appeared to recognize this position, and to found his case upon the assumption that what occurred here amounted to a rescission by mutual agreement. But the fallacy of this is apparent; there is nothing whatever to shew any assent on the part of the plaintiffs, on the

contrary they appear to have insisted that the contract on their part had been fully carried out. The mistake is in treating the correspondence which subsequently occurred as being between Bendelari & Co. and the plaintiffs, instead of between them and their own agents. In their first letter, complaining of the condition of a portion of the coffee, they ask them "to see the sellers, and let us know what to do, as we cannot use it."

In their reply they suggest to them to make some experiment, with the view of getting rid of the smell complained of, asked them to telegraph if they could not use it, and although they said that the plaintiffs declined to have anything to do with it, they offered to see them to induce them to make a reduction of half a cent per pound. To this Messrs. Bendelari & Co. reply that they will call in a coffee roaster to inspect the lot, and if anything can be done will communicate without delay.

It is clear that Messrs. Bendelari & Co. wrote to O'Shaughnessy & Co. as their agents, and the latter so treated the communication, offering to intercede with the plaintiffs and endeavor to obtain an allowance; but if the correspondence had taken place with the plaintiffs themselves, it would not, in my opinion, assist the argument that there was anything amounting to a rescission by mutual assent and a revesting of the property.

The property had passed, and Messrs. Bendelari & Co. had estopped themselves, if they ever had the right, from rejecting it. The plaintiffs were never even applied to to take back the goods, and when the complaint was made known to them repudiated all liability, and before the suggestion made by O'Shaughnessy was acted upon the insolvency occurred, and the assignee claimed the goods.

We are of opinion, therefore, that both questions should be answered in the negative, and that the present appeal should be allowed, with costs.

Appeal allowed.

CARRIER ET AL. V. ALLIN.

Insolvent Act, 1875, secs. 9 and 18—Proceedings under.

Held, reversing the judgment of the County Court Judge, that a *bonâ fide* purchase for value of a claim against an insolvent, made by a creditor for the express purpose of increasing such creditor's demand to an amount sufficient to issue a writ of attachment under section 9 of the Insolvent Act, 1875, is valid.

Held, also, that an application under section 18 to set aside a writ of attachment for a substantial insufficiency in the affidavit must be made within five days from the issue of the writ.

APPEAL from the County Court of the County of Ontario.

The insolvent petitioned the Judge of the County of Ontario to set aside a writ of attachment which had been issued against him at the suit of the plaintiffs, on the following grounds:—

1st. That the plaintiffs had, in order to make their claim of a sufficient amount to warrant an application for an attachment, procured a transfer to them of an account due by the insolvent to J. G. Joseph & Co.

2nd. That the plaintiffs held two small notes against third parties, which they had received from the insolvent as collateral security: that he was not indebted to the plaintiffs in the sum of \$200 over and above the value of the said notes, and that he was not liable to be placed in insolvency by them.

The evidence shewed that the plaintiffs procured the assignment of the debt due by the insolvent to Joseph & Co., to enable them to place the estate in insolvency.

It appeared that the insolvent had endorsed a note, made by one Williams, to the plaintiffs, as security for part of his indebtedness, but although long overdue and notwithstanding that the plaintiffs had endeavoured to collect the amount, it had never been paid; and evidence was given to prove that Williams was utterly worthless, and that the insolvent had so informed the plaintiffs' solicitor before the issue of the writ of attachment.

In regard to the other note which it was alleged the plaintiffs held as security, it was proved that it had been

arranged that the insolvent was to send up a note made to him by J. H. Perry, and endorsed by himself, together with \$13 in cash, to retire a certain other note, but the plaintiffs were to retain the last note as collateral security. The insolvent, however, sent the plaintiffs Perry's note, payable to themselves, which they immediately returned for the purpose of its being made and endorsed according to the understanding. The insolvent refused to endorse it, on the ground that Perry would be much more likely to pay it if he did not endorse it, whereupon the plaintiffs informed him that they would only take the note on collection, and if paid place it to his account. After the issue of the writ of attachment the note was paid to the plaintiffs' attorney.

The learned Judge found that the plaintiffs did, at the time of the application for the writ of attachment, hold from the defendant as security for the payment of their claim the two notes in question, which were in no way mentioned or referred to in the affidavit upon which the order for the attachment had been made; that since the issue of the writ of attachment one of them had been paid to the plaintiffs' attorney; and that after it became known to the plaintiffs that the defendant was insolvent, and immediately before the application for the writ of attachment, the plaintiffs had procured the assignment of Joseph & Co.'s claim, which he found was done to make the plaintiffs' claim against the defendant amount to \$200, so as to place his estate in insolvency.

Upon these grounds, and for the insufficiency of the affidavit in omitting to state that the amount of the indebtedness was \$200, over and above any security held by the plaintiffs, which point was not, however, expressly taken in the petition, the learned Judge set aside the proceedings.

The following were the appellants' reasons of appeal:—

1. Because the said Judge held that the plaintiffs' claim in their own right being under \$200, they could not add to it a claim purchased from a third party and duly assigned

to them in order to make their total claim over \$200, and that one creditor could not, under the Insolvent Act of 1875, purchase the claim of another creditor in order to make his total claim over \$200, so as to entitle him to proceed under section 9 of the said Act.

2. That the said writ of attachment could only be set aside on the grounds stated in the petition presented under section 18 of the said Insolvent Act; and no objection having been taken to the sufficiency of the affidavit filed on obtaining the writ of attachment, the said writ could not be set aside on the ground of any defect in said affidavit.

3. That the plaintiffs had at the time of the issue of the writ of attachment a claim provable in insolvency against defendant of \$200, over and above the value of any security held by them, and the defendant has not sustained any of the allegations contained in his petition.

4. That the notes of Williams and Perry, referred to in the defendant's petition, were not security within the meaning of the Insolvent Act.

5. That the said notes having been overdue and unpaid at the time of the issue of the writ of attachment, and the plaintiffs having sworn that the makers of said notes are worthless, and that they attached no value to them, the said Judge could not properly hold under the Act that the plaintiffs had not an unsecured claim of \$200.

6. That the evidence adduced tended to shew that the said notes were valueless, and the defendant, having informed the plaintiffs' solicitor prior to the issue of the writ of attachment that the said Williams was not worth anything, should be estopped from afterwards alleging to the contrary.

7. That the order of the said Judge is contrary to law and evidence and the weight of evidence.

The case was argued on the 28th of June, 1877, before Burton, J.A., sitting alone in insolvency.

C. H. Ritchie for the appellants. There is nothing in the

Insolvent Act to prevent a creditor, whose unsecured claim is less than \$200, from purchasing the claim of another creditor in order to entitle him to proceed under sec. 9. Under sec. 5 one of the grounds for setting aside a demand is, the procuring by a demanding creditor of the claim of some other creditor, but under sec. 18, which sets forth the various grounds upon which an attachment issued under sec. 9 can be set aside, this ground is omitted, which shews that the Legislature intended to permit such a purchase for the purpose of proceeding under sec. 9. The case of *Re Woodford*, 13 B. R. 575, recently decided in the United States, is directly in point. There it was expressly held that a claim can be bought in good faith in order to enable a creditor to join in a petition. If the omission in the affidavit of debt had been objected to in the petition it would, no doubt, have been fatal; but as the objection was not taken within the statutory period of five days, the defendant is precluded from raising it now. The learned Judge has not found that the Williams and Perry notes were of any value, but has left that question undetermined, shewing that his judgment was really based on the omission in the affidavit. If no weight is given to the objection as to the omission in the affidavit, then the onus of proof is on the defendant to shew that he was not indebted to the plaintiffs over and above any security. The Perry note was not held as collateral, but merely on collection, as was shewn by the evidence. It clearly appears that Williams's note was valueless, and as the defendant stated to the plaintiffs' solicitor that it was so, he should be estopped from now denying it.

Bethune, Q. C., (with him *G. Y. Smith*.) for the respondent. It is provided by sec. 5 of the Act that a demand made under sec. 4 may be set aside, if the claim of the demanding creditor be procured in whole or in part for the purpose of enabling such creditor to take proceedings under the Act; and the prohibition contained in this section must be regarded as an indication of the intention of the Legislature to prevent, in every case, the procurement of claims

for the purpose of taking proceedings in compulsory liquidation. In this case neither the plaintiffs nor Joseph & Co. could take proceedings under sec. 9, and to allow the plaintiffs to purchase the claim of Joseph & Co. for the purpose of taking such proceedings would be a fraud on the insolvent law, enabling the two to do indirectly what neither of them could do directly. There does not appear to be any English or Canadian case directly in point, but the cases decided in the Court of Chancery as to procuring claims for the purpose of instigating proceedings seem to be somewhat analogous and should govern here. The affidavit upon which the writ of attachment issued does not comply with the form given in the Act, inasmuch as it does not state that the defendant was indebted in \$200 beyond the value of any security held: *McDonald v. Cleland*, 6 P. R. 289; and the defendant was entitled to raise the objection at the hearing. It is true that the petition does not in express terms refer to the affidavit, but it alleges as a ground that the defendant was not at the time of the issue of the writ indebted to the plaintiffs in \$200 over and above the value of any security held by him. It is clear that the plaintiffs did hold security; and by sec. 106 they were bound to place a value upon it in the affidavit of debt. The Williams note was held as security, and the Perry note was held as collateral security.

July 4th, 1877, BURTON, J. A.—It was admitted that the claim of Joseph & Co. was purchased for the express purpose of enabling the plaintiffs to become petitioning creditors, the two sums amounting, it was said, to something over the requisite amount; and the plaintiffs' counsel expressed a desire that whatever decision might be arrived at upon the other point, I should express an opinion upon the validity of such a transaction to support the issue of a writ of attachment.

It was contended on the one side that, as the statute, in the case of a creditor making a demand under the 4th sec-

tion, in express terms forbids his procuring a claim either in whole or in part for the purpose of taking proceedings under that section, it must be regarded as an indication of the intention of the Legislature not to allow claims to be purchased in any case for the purpose of putting a party into insolvency: that here neither the plaintiffs nor Joseph & Co. were in a position to take proceedings to force the defendant's estate into compulsory liquidation, and that if one could by transferring his claim to the other make a legal petitioning creditor's debt, it would be a fraud on the Insolvent Law, enabling the two to do indirectly what they could not do directly.

The 4th section provides that in the event of the insolvent ceasing to meet his liabilities generally as they become due, any one or more of his creditors for unsecured claims of not less than one hundred dollars each, and amounting in the aggregate to five hundred dollars, may make a demand upon the insolvent, requiring him to make an assignment; and then follows the clause prohibiting the acquisition of any claim for the purpose of making up the amount to a sufficient sum to enable the creditor to take proceedings, so that the debt due to each creditor joining in the demand must in itself amount to at least \$100, and the aggregate to \$500, and no portion must be procured to enable the creditors to make the demand.

It was on the other hand contended that as the 9th section, which merely requires the creditor to shew that the debtor is indebted to him in a sum provable in insolvency of not less than \$200, over and above the value of any security which he holds for the same, contains no such prohibition, it must be assumed that it was designedly intended to confine it to the cases of a demand. No authority was cited on either side. The point came up incidentally in the case of *Labatt v. Boyle*, decided by my brother Patterson, but it became unnecessary in that case to pronounce upon it, although the learned Judge intimated that in that case, where the claim was transferred without consideration and for the purpose of enabling the plaintiff

to do under the Statute what neither he nor his transferror nor both together could have done, for the purpose of founding proceedings under section 9, it might probably be found that it might have to be decided against the plaintiff, and that it might be so decided without laying down any general rule adverse to the right to claim in respect of a debt acquired by assignment in the ordinary course of business, and at all events in good faith and for substantial value.

I have been more successful in my research than the learned counsel. I find that the same point arose under 5 Geo. II. ch. 30, and was decided by the Court of Queen's Bench in 1798: *Glaister v. Hewer*, 7 T. R. 498.

That Act provided that no commission of bankruptcy should be issued against any person upon the petition of one or more creditors, unless the single debt of the creditor petitioning for the same amounted to £100, or unless the debt of the two creditors so petitioning amounted to £150, or of three or more to £200.

In that case the bankrupt, at the time of the Act of Bankruptcy, was indebted to the creditor in a sum below £100, and to several other persons in smaller sums, and among others to one Wilson, to whom the bankrupt had some time previously given a small note for £11 12s. This note was endorsed to the petitioning creditor for a valuable consideration after the bankrupt had absconded, *in order to enable him to become petitioning creditor*, the two sums together amounting to over £100. It was contended there that no commission could have been sued out at the time of the Act of Bankruptcy by any creditor, or any number of creditors united; but it was held by Lord Kenyon, with the concurrence of the other members of the Court, that all that the Act of Parliament required was that there should be an existing debt of £100 in the petitioner: that the creditor had such an existing debt at the time of the petition, and that was all that was necessary to support the commission. This decision does not appear ever to have been questioned, and I must put a similar interpretation

upon the 9th section of the Act, and hold that a *bond fide* purchase for value, though made for the express purpose of increasing the creditor's demand to an amount to enable him to make the application, is valid.

Then as to the second point. The learned Judge has found that the plaintiffs, at the time of the issue of the writ, held as security the two notes, but he does not find whether they were or were not of any value; but he seems to found his opinion, as to this branch of the case, upon the insufficiency of the original affidavit, no reference being made in it to the fact that they held any security, or that the insolvent was indebted in \$200, over and above the value of these securities; and he refers to *McDonald v. Cleland*, 6 P. R. 289, in support of that view.

The learned Judge there held, and in my opinion properly held, that it was competent to the insolvent to move to set aside the attachment for want of, or for a substantial insufficiency in the affidavit, although that was not at that time one of the matters in respect to which section 18 in express terms gave him the power to apply for relief. But by the amended Act of 1876 this is made a ground for petitioning to set aside the writ, and I apprehend that it is now incumbent upon the insolvent to make the application to set aside the proceedings on that ground within the same period as is limited for petitioning on the other grounds of objection mentioned in that section, the intent of the statute being that these objections shall be disposed of summarily, and within as short a period as practicable. This would, if taken in the proper period, have been fatal, but not having been taken must be deemed to have been waived, and the matter must now be considered upon the case as it was presented to the learned Judge, upon the whole of the affidavits and papers, at the time he made the last order.

Although at first inclined to think differently, I have come to the conclusion that the evidence does not warrant the learned Judge in holding that Perry's note was held as collateral security for the plaintiffs' claim.

As I read the evidence, it was at first understood that Perry's note and \$13 in cash were to be sent to retire the note for \$32.47, but this last note was to be left as collateral, as it was expressed. In other words, the plaintiffs desired to run no risk by reason of any irregularity in the presentment or notice of dishonour of the Perry note, which, by the terms of the agreement, was to be endorsed by the insolvent.

The insolvent sent up the note payable to the plaintiffs, instead of to himself, and endorsed by him, and it was returned to him to be corrected, but he still declined to do so, and the plaintiffs then, in their letter of the 8th of February, consented to take it only on collection, and on no other terms. They did not bind themselves to wait for that note to mature, but acceded apparently to the insolvent's wish that it should appear to be out of his hands, as more likely to ensure its payment at maturity, and in the event of non-payment to save the expense of protest. Whilst so held the plaintiffs could not, I apprehend, in the event of the defendant's insolvency, have held it or its proceeds against his assignee.

Then as to Williams's note. The insolvent having omitted, as I have said, to raise the objection to the sufficiency of the affidavit, which would have been fatal, has undertaken to satisfy the Court that it was a valuable security. I do not understand the learned Judge to have held that it was of any value, his decision having proceeded, as I understand it, upon the ground chiefly that the transfer of the Joseph claim was insufficient to warrant the proceedings, and the insufficiency of the affidavit, coupled with the fact that it was made to appear that they held some securities. The fact that it was perfectly valueless security is, I think, abundantly established, the only evidence to the contrary being that of Williams himself, who, whilst swearing that he is able to pay, shews no good reason for its remaining so long unpaid, in addition to which Mr. Billings swears that the insolvent informed him shortly before the issue

of the writ of attachment that Williams was worth nothing.

The appeal therefore should be allowed, and the order setting aside the writ of attachment vacated, but as the plaintiffs' own want of care in preparing the original affidavits has probably led to the subsequent litigation, I do not think it a case for costs.

Appeal allowed without costs.

RE ANDREWS, AN INSOLVENT.

Insolvent Act 1875, sec. 39—Powers of assignee to avoid mortgage—Secs. 130, 132—Chattel Mortgage Act.

Held, affirming the judgment of the County Court Judge, that under sec. 39 of the Insolvent Act, 1875, an assignee represents the creditors for the purpose of avoiding a mortgage for want of compliance with the Chattel Mortgage Act.

An affidavit that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against — not saying against whom. *Held*, clearly not in compliance with such Act.

The learned Judge found under sec. 130 of the Insolvent Act 1875, that the mortgagee did not know of the insolvents' inability to meet their engagements, but that it was notorious, and that he had probable cause of believing it, so that the mortgage must be presumed to be made with intent to defraud creditors; and as a conclusion from these facts, he found that such intent was known to the mortgagee, and that sec. 132 also applied:

Held, that the finding of the facts required by sec. 130 was sustained by the evidence; but that the conclusion from these facts was not warranted, and that sec. 132 therefore did not apply.

APPEAL from the County Court of the United Counties of Leeds and Grenville.

The claimant, one Leslie, petitioned the County Judge, under sec. 125 of the Insolvent Act of 1875, for an order to compel the assignee to deliver up the goods covered by a chattel mortgage made by the insolvents to him.

It appeared that Leslie on the 4th of February, 1875,

lent \$800 to McMurchy, Andrews, & Co., for which they gave him their promissory note at one year, endorsed by S. G. Landon, and that it was then understood that Landon was to assign a mortgage which he held to McMurchy, Andrews, & Co., and they were to assign it to Leslie to secure the \$800; but this was never done.

While the note was current the firm was dissolved by two of the three partners retiring. The remaining partner, Donald Andrews, then formed a partnership with David Andrews, senior, and David Andrews, junior, under the firm of David Andrews & Sons. The new firm agreed to assume the debts of the old firm. There did not appear to have been any formal novation of the contract with Leslie, but he understood he was to be paid by the new firm. When the note fell due the new firm, the present insolvents, could not pay it, and Leslie agreed to wait three months on being secured by a chattel mortgage.

The mortgage now in question was accordingly made by the insolvents on the 14th of February, 1876. The affidavit of *bona fides* stated that it was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against —, omitting to say against whom. On the 4th of April following they made an assignment under the Insolvent Act of 1875, in pursuance of a demand made more than thirty days after the date of the mortgage.

The assignee contended before the Judge of the County Court that the mortgage was void for want of compliance with the requirements of the Chattel Mortgage Act, and that the facts brought it within the provisions of the Insolvent Act relating to fraudulent preferences.

The learned Judge found that the mortgage was not given in lieu of the one held by Landon, which was to have been assigned; nor in pursuance of any agreement originally made: that although the mortgagee did not know of the inability of the insolvents to meet their engagements, it was public and notorious, and that he had probable cause

for believing it; and he held that the mortgage was void under secs. 130, 132 and 133 of the Insolvent Act of 1875, as well as by reason of the defective affidavit.

The mortgagee appealed from that decision.

The case was argued on the 29th August, 1877, before Patterson, J. A., sitting alone in Insolvency.

Bethune, Q. C., for the appellant. There was an express agreement that security should be given on specific property at the time the money was lent, and therefore the mortgage in question cannot be considered an unjust preference. It is true that the Judge of the County Court has found that this mortgage was not given in substitution of the one agreed to be assigned, but that makes no difference, as the change does not matter to the estate. Under section 39 of the Insolvent Act, the assignee has no power to avoid the mortgage. The mortgage was valid between the immediate parties to it; and as the insolvent could not impeach it, neither can the assignee. The word "creditor," in the Chattel Mortgage Act, means judgment creditor. He referred to *Watson v. Henderson*, 25 C. P. 562; *Risk v. Sleeman*, 21 Grant 250; *Ex parte Kevan*, L. R. 9 Chy. App. 754; *Archbold* on Bankruptcy, G. & B.'s ed. 1097.

T. D. Delamere for the respondent. If the mortgage had been on the property which was mentioned when the money was advanced, no objection would have been made, as the mortgages on it are in excess of its value; but the respondent is entitled to dispute the property in question being given to secure the petitioner's claim. It cannot be contended that a specific lien can be changed from one property to another. The estate has derived no benefit in return for this mortgage, and it is clearly void under the Insolvent Act. The powers conferred on the assignee by the 39th section of the Insolvent Act are not limited to the insolvent's rights under that Act, as he is expressly authorized to take any steps for the benefit of the estate which any creditor might have taken.

August 31, 1877. PATTERSON, J. A.—I have had the assistance of a very careful and clear statement of the grounds of the decision in an able judgment written by the learned Judge, as well as of the argument of counsel, who have dealt merely with those points of the case which are really in contest.

The learned Judge held that section 130 and 132 of the Act applied to avoid the mortgage. He found, under section 130, that the mortgagee did not know of the inability of the insolvents to meet their engagements, but that he had probable cause for believing such inability to exist, and that their inability was public and notorious when the mortgage was made. The other circumstances mentioned in section 130 concurring, he held the presumption established that the insolvents had made the mortgage with intent to defraud their creditors. I think that finding was fully sustained by the evidence.

In applying it however to section 132, I do not adopt the reasoning acted upon. Section 132 requires, in order to avoid the transaction, that the debtor's intent to defraud his creditors shall have been known by the person contracting with the debtor. There is no evidence of such knowledge on the part of Leslie. The learned Judge does not find the fact upon direct evidence, but deduces it, though with hesitation, as the proper conclusion from the facts found by him under section 130. In my opinion those facts do not support the conclusion. I should probably have hesitated even if it had been found that the creditor knew of the debtor's inability to meet his engagements; but that position having been negatived, it does not seem to me that we can fairly infer from his having had the means of knowledge of such inability (which is the effect of the finding under section 130) without actual knowledge of it, that he had actual knowledge of the fraudulent intent which is presumed to have existed.

The learned Judge further found, under section 133, that the mortgage was made in contemplation of insolvency, and gave the mortgagee an unjust preference. I cannot say that this finding is not correct. It is a finding of a fact upon the

weight of evidence. Even if inclined to differ from the learned Judge, I could not say that my view would be likely to be more correct than his. But I do not differ from him, nor do I see any ground for holding otherwise, at all events as to the contemplation of insolvency.

It was urged by Mr. Bethune that the preference was not unjust, because security was to have been given when the debt was originally contracted. This contention cannot prevail. The security originally spoken of was abandoned, as far as we can see from the evidence, because not insisted on by Leslie, or, if there was any binding agreement, he may, for anything now shewn to the contrary, have a remedy on it still. It is clear, as the learned Judge has found, that the mortgage now in question has no reference to that old agreement. The information given about the old agreement is vague. It seems to have made so little impression on Leslie himself, that when first examined he forgot to mention it, or rather stated that there was no understanding that he was to have the mortgage; and he had afterwards to confess that he had forgotten it then, and had made an untrue statement. It is impossible to treat the statement he now makes as shewing that he could justly claim a preference, even amongst the creditors of the old firm of McMurchy, Andrews & Co. Still less can he set up the shadowy agreement with the old firm as creating any such right as against the creditors of the present insolvents.

If he had got the security from Landon, I do not suppose there would have been any reason why he should not have kept it. That would have been Landon's affair. But his failure to get it, whether due to his own remissness or Landon's default, is not a just ground for diverting the assets of these insolvents from their general creditors. I agree, therefore, that the facts found are, under section 133, fatal to the claim.

I also agree with the learned Judge in his view of the application of the Chattel Mortgage Act. The affidavit contains the statement that the mortgage was not executed for the purpose of (*inter alia*) "preventing the creditors of

such mortgagor from obtaining payment of any claim against ———, ” not saying against whom. It is clear that this cannot satisfy the statute.

But it is contended that the mortgage, being good as between the parties to it, is good against the assignee in insolvency of the mortgagors. The statute (Consol. Stat. U. C., ch. 45, sec. 3,) declares that in case the mortgage and affidavits are not registered as provided, the mortgage shall be absolutely null and void as against creditors of the mortgagor. The argument is, that the assignee does not represent the creditors for the purpose of avoiding the mortgage, but takes only such interest in the assets of the insolvent as the insolvent could himself have asserted.

Carrying this a step farther towards its legitimate consequences, it maintains that a transaction which a creditor could successfully impeach becomes impregnable, and excludes the creditors as soon as insolvency intervenes. The law is not so defective as to permit this result. Treating of the statute 13 Eliz. ch. 5, and of the rights of creditors to avoid conveyances under that statute, the following passage from *May* on Fraudulent Conveyances, at p. 149, states the English doctrine: “The representatives of creditors are considered as creditors within the statute. An assignee therefore, or trustee of an insolvent or bankrupt, although in right of the debtor he only takes such interest as the debtor was beneficially entitled to, yet he represents the creditors also for all purposes; and, if any fraud against creditors exists in a transaction to which the insolvent or bankrupt was a party, the assignee or trustee may take advantage of it. A deed, which is void as against creditors, is void also as against those who represent creditors. It was, indeed, said by Abbott, C. J., in *Robinson v. McDonnell*, 2 B. & Ald. 137-6, ‘The bill of sale might be void under the statute of Elizabeth as against creditors, but not as against the parties who executed it, and their assignees are in this respect in no better situation.’ But it is submitted that the assignees are to be looked at in a double character; not only as representing the bankrupt (one of the parties to the deed),

but also as standing in the place of, and entitled to exercise all the rights of creditors. *Qua* the representatives of the bankrupt they can have no power to set aside the deed, but *qua* the representatives of the creditors they have that power; for as Lord Loughborough said in *Anderson v. Maltby*, 2 Ves. 244, 255, 'Assignees have all the equity the creditors have, and may impeach transactions which the bankrupt himself would be stopped from impeaching,' in fact assignees have frequently been allowed as creditors under the statute without question."

Whatever question may have been possible under the Insolvent Act of 1864, sec. 4 of which, sub-sec. 9 empowered the assignee only to sue for the recovery of debts due to the insolvent, and to take proceedings that the insolvent might have taken with respect to the estate, and to intervene and represent the insolvent in all suits and proceedings by or against him, was removed by the Act of 1869, sec. 42, which is followed by sec. 39 of the Act of 1875.

Those sections add to the powers expressly given by the Act of 1864 the power to sue for rescinding agreements, deeds and instruments, made in fraud of creditors, and for the recovery back of moneys alleged to have been paid in fraud of creditors, and to take, both in the prosecution and defence of all suits, all the proceedings that any creditors might have taken for the benefit of the creditors generally.

This leaves no foothold for the argument that under our statute the assignee represents the insolvent only.

I dismiss the appeal, with costs.

Appeal dismissed.

HOWELL v. MCFARLAND.

*Partnership—Assignment by one partner of debts due to the firm—35 Vic.
s. 12. O.*

D. C., one of two partners, in consideration of \$100 paid to him, assigned to the plaintiff a debt of \$118, due to the firm for goods sold to the defendant in the ordinary course of business, by a deed made and executed in his individual name, without his partner's knowledge, but by which he professed to transfer all debts due to the two partners, naming them, from the defendant. At the trial his partner swore that he considered himself bound by the assignment, and that he thought that D. C. had authority to make it.

Held, reversing the judgment of the County Court, that the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other.

Held, also, that, even in the absence of implied authority, the subsequent ratification was sufficient.

Held, also, that the fact that the transfer was by deed did not deprive it of its effect as a written contract.

APPEAL from the County Court of the county of Haldimand.

The plaintiff sued as assignee of a debt due by the defendant to Warren S. Collver and Darius Collver.

The third plea alleged "that the plaintiff at the time of the beginning of this action was not possessed of the beneficial interest in the said several causes of action in the declaration mentioned, and had not at the time last aforesaid the right to receive and give an effectual discharge for the moneys payable under the said several causes of action."

It appeared that the two brothers Collver were partners in business. The debt was for goods sold to the defendant in the ordinary course of business. The amount was \$118.98. It was sold to the plaintiff for \$100 by Warren Collver, who assigned it by a deed reading thus: "This indenture made the third of October, A. D. 1876, between Warren S. Collver of, &c., of the first part, and William Allen Howell of, &c., of the second part, witnesseth that in consideration of \$100 now paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, the said party of the first part doth hereby assign, transfer, and set over to the said party of the second part all debts, claims, and demands on account or otherwise now due or owing to the said Warren

S. Collver and Darius Collver from William McFarland of," &c. This was signed and sealed by the plaintiff and by Warren S. Collver.

It was objected that this did not transfer the interest of Darius in the debt.

The evidence on the subject of the authority to assign was that of Warren S. Collver, who said: "I had no written or express authority to execute this assignment for my brother, except that it was part of our agreement as partners that I should transact all business of the firm as I saw fit"; and that of Darius Collver, who said: "Our agreement of partnership was verbal, not in writing. Part of our agreement was that he should transact ordinary business of the firm in buying and selling goods and collecting accounts, to run the business to the best advantage. I consider he had a perfect right to make this assignment, and I consider myself bound by it. I was never consulted as to the assignment, and knew nothing of it till made."

On these facts the learned Judge of the County Court held that the interest of Darius Collver had not been assigned, and nonsuited the plaintiff.

A rule to set aside the nonsuit was subsequently discharged.

The plaintiff appealed.

The case was argued on the 6th September, 1877 (a).

Bethune, Q.C., for the appellant. The plaintiff is entitled to recover under either 35 Vic. ch. 12, or the Administration of Justice Act 1873, sec. 2, as the assignment is valid both at law and in equity. It cannot be disputed that Warren Collver could have endorsed a bill of exchange for the amount of the debt. He had power to sell the chattels of the firm, and it is only reasonable that he should have authority to sell the debts. It was held in *Patterson v. Maughan*, 39 U. C. R. 527, that a chattel mortgage on the property of the firm can be given by one partner. *Fraser v. McLeod*, 8 Gr.

(a) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and GALT, J.

268, is cited in the judgment of the Court below as an authority against us, but in that case the partner had no power to act, as it was a matter entirely beyond the scope of the business, while here it was incidental to the business. But even if there is no such authority to be implied, the defect is cured by the subsequent ratification of Darius Collver. The fact that the assignment was by deed does not prevent it having the effect of a writing, which is all that is required by the statute: *Halfpenny v. Pennock*, 33 U. C. R. 229. In equity there is no difference between sealed and unsealed instruments: *Webb v. Hewitt*, 3 K. & J. 442. A vendor's lien is assignable: *Dryden v. Frost*, 3 M. & C. 670. Under section 2 of the Administration of Justice Act 1873, a purely money demand can be prosecuted at law, although the plaintiff's right to recover be a purely equitable one, and Consol. Order 59 allows an assignee to sue without making the assignor a party, so that there is no doubt that such an action can be brought at law by an assignee in his own name. He referred to *Farquhar v. City of Toronto*, 12 Gr. 186; and *Lindley on Partnership*, 3rd ed., 290.

Robinson, Q. C., for the respondent. The general power which a partner possesses of acting for the partnership, is restricted to matters within the ordinary course of the business in which they are engaged; and a sale by one partner of the debts of the firm, and, as in this case, at a discount, is not authorized. Nor does it appear that he is acting for the partnership, as it is made and executed by the brother in his individual name, and the consideration is expressed to be paid to him. It is, therefore, only sufficient to pass his interest, the rule being that where a partner contracts in his own name he is individually liable, although the partnership may get the benefit of the contract. There is no case where the firm has been held bound by a deed purporting to be made by one partner in his own name, not for or on account of the partnership, for a consideration paid to himself, and executed by him in his own name, the other partners not executing or being parties to it. One partner cannot bind his co-partner under seal, without express authority. The

ratification at the trial was insufficient. The act which is said to have been ratified was not done, and did not purport to be done, for the person ratifying. He referred to *Parsons on Partnership* (1870), 179, note *g*; *Story on Partnership*, 6th ed. 102.

September 15, 1877 (*a*). PATTERSON, J. A., delivered the judgment of the Court.

We are of opinion that the assignment of this debt was a matter within the scope of the partnership business, and covered by the agency of one partner for the other.

Before the law recognized the assignment of choses in action like this account, it might have been necessary to procure the defendant's promissory note or acceptance for the amount, and to endorse or transfer it, in order to assign the debt at law.

It cannot be questioned that the ordinary partnership agency would have authorized one partner to take a note or draw a bill for the amount of the account, and afterwards to negotiate it, even though in doing so he made his co-partner liable as endorser.

It would still be competent for one partner to do this, but the law has authorized a shorter mode of effecting one part of the transaction. It no longer requires a negotiable instrument to make the transfer valid at law, but enables that to be effected by any writing.

The character of the partnership asset, as between the partners, is the same whether the debt is the subject of an express promise to pay it contained in a negotiable instrument, or contained in an instrument not negotiable, or rests merely on the legal liability, without any express promise. The right to deal with it as between the partners is and always was the same; and now the power to transfer it at law is the same.

The plaintiff's title does not rest alone on the implied authority of the one partner to deal with this partnership

(*a*) *Present*.—BURTON, PATTERSON, MOSS, JJ. A., and GALT, J.

asset. There is sufficient evidence of express authority. The evidence of Darius, whose interest the defendant contends was not transferred, removes any question. He shews that his understanding of the terms of the partnership, which were not reduced to writing, is, that the matter was within his partner's authority, and even if this were not so his ratification of his partner's act would be equivalent to a power previously given, as in *Ancona v. Marks*, 7 H. & N. 686, the ratification by the plaintiff himself, after action, of what had been done in his name, was held to make good his right to sue, notwithstanding that there was on the record a plea denying his right.

The form of the writing is sufficient. One partner, in consideration of money paid to him, assigns all debts due to the firm by the defendant. He had authority to make the transfer. In this respect he was agent for his partner, and he professed to transfer the partner's interest as well as his own. The circumstance that the transfer is by deed does not deprive it of its effect as a written contract simply, as is fully established by the cases cited to us.

The plaintiff's right to recover under the statute, 35 Vic. ch. 12, O., is made out by the assignment, whether the power of the one partner to assign for both is rested on the ordinary doctrine of agency between partners, or on the partnership agreement as understood by that partner whose interest the defendant sets up, or on the subsequent ratification. Without the assistance of that statute, his right in equity is clear; and the Administration of Justice Act, 36 Vic. ch. 8, sec. 2, permits a purely money demand to be prosecuted at law, although the plaintiff's right to recover be an equitable one only.

The appeal must be allowed, with costs; and the rule in the Court below made absolute.

Appeal allowed.

MACDONALD v. THE GEORGIAN BAY LUMBER CO.

Foreign bankruptcy—Assignment thereunder—Lands in Canada.

Bankruptcy proceedings in a foreign country will not affect real estate in Canada.

The insolvent, who owned lands in Canada, residing and carrying on business in the State of New York, was, with his co-partners, adjudicated a bankrupt by the Court of that State on the 15th November, 1873, and, in accordance with a resolution passed by the creditors under a provision of the Bankrupt Law of the United States, the bankrupts, on the 14th February, 1874, conveyed their estates to a trustee appointed by the creditors for the purpose of winding up the estate. The deed was styled "In bankruptcy," and purported to "convey, transfer, and deliver all their and each of their *estate* and effects" to the trustee, to be applied for the benefit of the creditors in like manner as if the bankrupts had, at its date, been duly adjudged bankrupts, and the trustee appointed assignee in bankruptcy under the Bankruptcy Act of the United States. On the 26th August, 1874, a writ of execution against the insolvent's lands in Canada was placed in the sheriff's hands by the defendants, who had in the meantime recovered a judgment against him. Subsequently, the insolvent, by way of further assurance, executed a conveyance of all his lands in Canada to the same trustee for the said creditors. The plaintiff, the substituted trustee, filed a bill to compel the removal of the writ of execution on the ground that it formed a cloud on his title to these lands.

Held, reversing the judgment of PROUDFOOT, V. C., 24 Gr. 356, that the plaintiff was not entitled to relief, for that the deed of the 14th February merely vested in the trustee the estate, which would have passed to an assignee by operation of the Bankruptcy Law; and there was no evidence of any intention to pass more.

Per PATTERSON, J. A., the words "convey, transfer, and deliver," were operative words of conveyance: that the debts due to the creditors formed a sufficient consideration: and that the general description "all and each of their *estate*" would have been sufficient to convey the lands in question, unless restrained, as they were, by the effect of, and construed, as they must be, with reference to the intention shewn by the whole instrument.

THIS was an appeal from the decree of Vice-Chancellor Proudfoot, reported 24 Grant 356. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The following were the appellants' reasons of appeal:—

1. That nothing has been shewn to take this case out of the well-known rule of International Law—that bankruptcy proceedings *in invitum* in a foreign state do not affect the title to, or pass any estate in, real property and immovables situate in this country, the disposition of which

is exclusively governed by the *lex loci rei sitæ*: *Story's Conflict of Laws*, s. 428; *Westlake's International Law*, ss. 67 and 283; *Von Savigny*, Guthrie's Edition, p. 212; *Robson's Bankruptcy*, 2nd ed., 1872, p. 393; *Burge's Commentaries on Foreign and Colonial Laws*, 1838, vol. i., p. 615; *Bell's Commentaries*, Shaw's Edition, p. 1294, and vol. ii., p. 680; *Oakey v. Bennett*, 11 How. 33; there being no power in the Courts of the foreign state to enforce their decree or order in bankruptcy here: *Archbold's Bankruptcy*, by *Griffith and Holmes*, 1869, p. 393; and no legislative body will be presumed to attempt to exceed its legitimate jurisdiction by interfering with vested rights in the soil of another state.

2. The doctrine laid down in *Royal Bank of Scotland v. Cuthbert*, 1 Rose 462, that a legal obligation existed in the debtor to execute a conveyance of his real estate in foreign lands in aid of the home bankruptcy proceedings, was formally disavowed by the House of Lords: *Selkrig v. Davies*, on appeal, 2 Dow's H. L. C. 230, 246; S. C. 2 Rose, 97; and the correctness of the modified view then promulgated, that the bankrupt might be coerced into executing such a deed by withholding his certificate, has been disputed: *Cockerell v. Dickens*, 1 M. D. & De. G. 45, 77, and has never been acted on. At any rate, in this case, this presumed obligation was not enforced by obtaining from the bankrupt a conveyance which would convey lands in this country (as shown from the following reasons of appeal), until after the defendants' execution was lodged in the hands of the sheriff.

3. The deed of the 14th February, 1874, is a statutory deed, deriving its force and validity from s. 5103 of the Revised Statutes of the United States of America (s. 43 of former Act; *Bump's Law of Bankruptcy*, p. 590), and follows *verbatim et literatim* the words therein set forth. This deed was prescribed by a Judge acting under said statute, and he embodied the form in an order made by him entitled in the bankruptcy proceedings. By the words of the deed, whatever property or estate passes is limited (in ac-

cordance with the Act) to the trustee to hold in the like manner as if the bankrupts had been at the date thereof adjudged bankrupts, and the trustee had been appointed assignee under the said Act. The operation is therefore cut down to the mere conveyance of what would have been vested *in invitum* in an assignee on his appointment: *Re Williams*, 2 B. R. 229; S. C. 1 L. T. B., 107, 113; and the professional evidence adduced agrees with this contention. That this is the true construction is plain from the fact that s. 5103 provides that in case an assignee is first appointed, and the creditors afterwards substitute a trustee, this statutory deed is to be executed by the assignee. It was therefore only by an accident that this deed was executed by the bankrupt in person. The assignee derives his title from a conveyance executed by the Judge or registrar, which takes effect by operation of law. Sec. 14.

4. That this deed derives its effect from the statute is plain from the fact that by its own force (supposing other objections laid aside) it would only pass the estate vested in bankrupts at the moment of execution, leaving them free to have aliened all their property between that day and the date of the creditors' petition for adjudication, which is absurd. Evidently it derives its force from the statute, and its operation is governed by analogy with section 14, which provides for the title of the assignee *relating back* to the inception of the proceedings. Such a deed is disregarded in the States: *Osborn v. Adams*, 18 Pick. 245; and a deed from a bankrupt to his assignee after commission adds nothing to the latter's title. *Holmes v. Remsen*, 20 Johns. 267.

5. A deed from a bankrupt, in order to support the trustee's title in extra-territorial immovables, must be framed and executed in accordance with the *lex loci rei sitæ*: Page Wood, V. C., *Simpson v. Fogo*, 1 H. & M. 195; *Robson's Bankruptcy*, 2nd ed., 1872, p. 393; *Cockerell v. Dickens*, 1 M. D. & De G. 79; *Benfield v. Solomons*, 9 Ves. 81; and this principle was recognized in the Imperial Statute 6 Geo. IV., cap. 16, s. 64, which required a conveyance to

assignees of any lands in the plantation to be registered, enrolled or recorded, whenever, by the laws of such colony, registration, &c., was necessary. Such a deed must derive all its force from itself, and must not invoke the foreign law to support it in any particular. *Vide* V. C. Proudfoot's remarks in judgment herein.

6. The deed of the 14th February, 1874, is not so framed and executed as to pass real estate in this country, inasmuch as

(a) It is not expressed to be made *inter partes*, and is neither a deed poll nor an indenture.

(b) It does not shew any consideration, and we cannot import one from the foreign bankruptcy law.

(c) The operative words used, "convey, transfer, and deliver," have no operation in passing real estate here, either at common law or by statute.

(d) It is not a charter of feoffment as it lacks livery of seisin, the word "give," a consideration, or a use upon a use; nor a grant, not containing that word; nor a bargain and sale, there being no money consideration to raise a use; nor a release, for it has not the apt words, nor is there any particular estate already vested in the releasee, nor a covenant to stand seised—in short, it comes under no known form of conveyance or assurance.

(e) At most it would carry an estate for life, the word "heirs" being omitted.

(f) It does not specify any parcels.

(g) And where a deed is supposed to deal with land situated in a country where titles are registered, it would be reasonable to require a greater certainty of description than would appear to be exacted by some of the English cases cited in the judgment herein—all of which, however, give some clue to the whereabouts of the land.

(h) There are no covenants for title or further assurance.

7. The deed of the 14th February, 1874, is not a contract for a conveyance of land, and could not be enforced as such, as it does not contain sufficient particulars to satisfy the requirements of the Statute of Frauds. It was not contemplated

at the time by either party as passing more than would have vested *in invitum* in an assignee, and to give it any further operation, even if it could be done, would not carry out their intentions. Moreover it has not been pleaded by this plaintiff as a contract.

8. The law regards a trustee of a bankrupt, not as a purchaser for valuable consideration, but as in the same class as voluntary assignees and personal representatives: *Cary v. Crisp*, 1 Salk. 107; *Mitford v. Mitford*, 9 Ves. 87; *Re Barr's Trusts*, 32 L. J. Rep. 9; *Re Atkinson*, 2 DeG. M. & G. 140; S. C., 4 DeG. & S. 548; *Dearle v. Hall*, 3 Russ. 1. So that his equity, if we can consider this as an inchoate equitable assignment of lands, will be no better than that of the execution creditor who has obtained priority, and there is no authority or reason for compelling that creditor to forfeit the fruits of his diligence and go and litigate his claim anew before a foreign forum. *Vide Ingraham v. Geyer*, 13 Mass. 146, as to voluntary assignment of personalty by debtor in one State not controlling attachment in another State.

9. By the Bankruptcy Law of the United States, the proceedings in the matter of these bankrupts were irregular and invalid, inasmuch as—

(a) The committee who were nominated to superintend the trustee were not creditors of the bankrupts as required by section 5103, which is a condition precedent to the appointment of the trustee; and the provisions of the Act in this respect are to be construed strictly, as the result is to substitute the supervision of a committee for that of the Court.

(b) The Bankruptcy Law gives no power for a trustee to resign, and the appointment of the present plaintiff, not being made by resolution of the creditors, is irregular and invalid, and gives him no *locus standi* as representing the estate.

(c) The deeds from the bankrupts to the said Cadwalader, and from Cadwalader to the plaintiff, are invalid and inoperative, as they are not under oath as required by

section 5103, and by the order of the District Court directing their execution.

10. The subject matter of this suit was never within reach of the United States Bankruptcy Law, and could not have benefited the creditors in that country in any manner. The superior diligence of the defendants, therefore, has abstracted nothing from the common fund, and there is nothing inequitable in allowing the defendants to keep what the other creditors cannot be said to have lost : *Roe v. Smith*, 15 Gr. 344.

The following were the respondent's reasons against the appeal :—

1. The plaintiff derived his title to the property in question by conveyances from Dodge, the execution debtor, which were and are operative upon the ordinary principles of law applicable to grants of land in the Province of Ontario.

2. The plaintiff's title depends in no way upon the operation or effect of the Bankruptcy Law of the United States upon real estate situate in this Province.

3. It was and is necessary only to refer to such proceedings in bankruptcy, for the purpose of shewing that there was a good and valuable consideration for the execution by Dodge of the conveyance of the 14th day of February, 1874, and such deed became and was at the time of the execution thereof equally valid as if created in this Province.

4. At the time the the defendants' writ of execution against the lands of Dodge was placed in the hands of the sheriff, the land in question had ceased to be that of Dodge, who had no longer any property therein, and the execution of the defendants can have no tortious operation, so as to make that land which was not Dodge's still Dodge's, and so defeat Dodge's own conveyance.

5. The Registry Law cannot affect the issue between the plaintiff and defendants, and the only proper reference to its provisions is for the purpose of shewing that the decree

of the Court is necessary to protect the plaintiff against the cloud which the defendants could thereby place upon the plaintiff's title.

6. For these and other reasons appearing in the judgment of the learned Vice-Chancellor of the Court of Chancery, the plaintiff submits that this appeal should be dismissed, with costs, and the decree herein confirmed.

The case was argued on the 18th June, 1877 (*a*).

Dalton McCarthy, Q. C., (with him *Rye*) for the appellants.
Crooks, Q. C., for the respondent.

The arguments fully appear from the reasons for and against the appeal.

The following additional cases were cited for the appellants: *Perceval v. Perceval*, L. R. 9 Eq. 391; *Stone v. Van-Heythuysen*, 1 Kay 721; *Jenner v. Jenner*, L. R. 1 Eq. 361; *Ringer v. Cann*, 3 M. & W. 343; *Grahame v. Brown*, 12 C. P. 418; *Thomas v. Davis*, 1 Dickens, 301.

September 15, 1877. BURTON, J. A.—It was conceded upon the argument that, under the proceedings in bankruptcy in the United States, the real estate of the bankrupt in Ontario would not pass to the assignee unless he acquired a title to it by the voluntary act of the debtor, and under a conveyance sufficient to pass the property under the laws of the Province.

Anson G. P. Dodge and his co-partners were adjudicated bankrupts by the District Court of the Southern District of New York, on the 15th Nov., 1873, under the provisions of an Act of the United States of America establishing a uniform system of bankruptcy throughout the United States.

On the 14th February following, a trustee was appointed under a resolution passed by three-fourths in value of the creditors of the bankrupts whose claims had been proved to the effect that it was in the interest of the estate that

(*a*) *Present*.—BURTON, PATTERSON, MOSS, J. J. A., and BLAKE, V. C.

it should be wound up and distributed by a trustee, and an order of the Court was thereupon made that the bankrupts should convey all their estate to the trustee in a form set forth in the order.

The sections of the Bankrupt Act under which these proceedings were taken provide that the bankrupts or their assignee, if an assignee has then been appointed, shall, under oath, convey, transfer, and deliver all the property and estate of the bankrupts to such trustee, who shall, upon such conveyance and transfer, have and hold the same in the same manner and with the same powers and rights, in all respects as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed.

By reference to the 14th section we find that as soon as the assignee is appointed the Judge, by an instrument under his hand, assigns and conveys to him all the estate, real and personal, of the bankrupt, which assignment relates back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, vests in the assignee.

But it was conceded on the argument, and it is unquestionably the law, that under such an instrument the real estate of the bankrupt in a foreign country would not pass, and the trustee, if an assignee had been appointed, would take by transfer from him such estate, and such estate only, as had been vested in him as such assignee, and if no assignee had at that time been appointed the trustee would take the same estate and no other as would by operation of law have passed to the assignee.

Our attention was called to a clause in the 14th section of the Act which provides that the debtor shall at the request of the assignee execute any deeds or writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt, and to the 26th section, which requires him to sign all instruments to enable

the assignee to recover and receive all the property and estate assigned, wherever situate; but these must be held to apply to such property as in virtue of the adjudication of bankruptcy, and the appointment as assignee, vest in him in that character.

The construction I should place upon section 5103 (section 43) is, that the title of the trustee chosen under it is the same in all respects as the title vested in an assignee regularly appointed; and such is the construction placed upon it in some of the decided cases in the United States. See *In re Williams*, 1 L. T. B. 107-113.

That is to say, the operation of such a deed is cut down to the mere conveyance of what would have passed *in invitum* to an assignee on his appointment. The concluding words of the section would seem to place it beyond question, referring to the conveyance to the trustee, who, it is said, shall have and hold the same, in the same manner and with the same powers and rights, in all respects as the assignee in bankruptcy would have done had such resolution not been passed. I have already intimated my views that the 14th and 26th section are intended to apply to the execution of such documents as the assignee or trustee might require for the purpose of enabling him to recover or make the evidence of his title to such property as passed under the bankruptcy proceedings, and that under those provisions a bankrupt could not be compelled to convey lands in a foreign country to his assignee; but if I am wrong in that view, and these sections have a wider operation than I suppose, it is sufficient to say that the power was not exercised, nor was any conveyance executed purporting to convey the lands in Canada, until after they were bound by the defendants' writ.

If, as I assume, the deed of the 14th February was a mere statutory conveyance, depending for its effect entirely on the language of the Act, by which it is provided that it shall relate back to the commencement of the proceedings, it is unnecessary to consider the argument that was addressed to us, that it might be regarded as a contract for

the conveyance of these lands, to which effect has been given by the subsequent conveyance. It was not in the contemplation of the parties at the time to pass anything more than would pass under the proceedings. This land would not have passed, and to give this instrument any further operation than what it purports on its face to be, viz., a final and completed instrument in itself, would not be to carry out the intention of the parties.

It becomes also unnecessary to consider whether relief would in any case be granted for the removal of a writ of execution on the ground that its retention in the hands of the sheriff operated as a cloud upon the plaintiff's title to certain lands. I offer no opinion upon that question; but on the ground that the lands in Canada were not affected by the deed of the 14th February, which was inoperative as to them, I think the plaintiffs have disclosed no case for relief, and that the bill should be dismissed and this appeal allowed, with costs.

PATTERSON, J. A.—A petition in bankruptcy against Dodge & Co. was filed in October, 1873, in the District Court for the Southern District of New York by the Consolidation National Bank, and on the 15th November, 1873, Dodge & Co. were adjudicated bankrupts. On 10th February, 1874, a proceeding was taken under a provision of the Bankrupt Law of the United States; that provision is to be found at p. 590 of *Mr. Bump's Practice in Bankruptcy*, 7th ed., as section 5103. It is, in effect, that if at the first meeting of creditors, or at any meeting of creditors specially called for that purpose, three-fourths in value of the creditors who have proved their claims shall resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt shall be settled by trustees, under the inspection and direction of a committee of the creditors, then, after certain proceedings, the bankrupt, or his assignee in bankruptcy, if an assignee has been appointed, shall, under the direction of the Court and under oath, convey, transfer, and deliver all the property

and estate of the bankrupt to the trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner and with the same powers and rights in all respects as the bankrupt would have had or held the same if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed. Provision is made for the trustees winding up the estate, and it is declared that the winding up and settlement of any estate under the provisions of that section shall be deemed to be proceedings in bankruptcy.

The reference to the holding of the property by the assignee relates to the provision contained in section 5044, at p. 438 of *Mr. Bump's* book, that as soon as an assignee is appointed and qualified, the Judge, or when there is no opposing interest the registrar, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto; and such assignment shall relate back to the commencement of the proceedings in bankruptcy; and by operation of law shall vest the title to all such property and estate, both real and personal, in the assignee, although the same is then attached on mesne process against the debtor; and shall dissolve any such attachment made within four months next preceding the commencement of the bankruptcy proceedings.

On 14th February, 1874, the deed was made on which the question before us turns. It is in the following words:

In the District Court of the United States for the Southern District of New York.

In Bankruptcy.—In the matter of Anson G. P. Dodge, William Jay Hunt, and Samuel Scholefield, bankrupts.

SOUTHERN DISTRICT OF NEW YORK. [S.S.]

This indenture, made this 14th day of February, A. D. 1874, between Anson G. P. Dodge, of the city, county, and State of New York; William Jay Hunt, of Jersey city, in the county of Hudson, and State of New Jersey; and

Samuel Scholefield, of the city and county of Philadelphia, in the State of Pennsylvania; and John L. Cadwalader, of the city, county, and State of New York, as trustee on behalf and with the consent of three-fourths in value of the creditors of the said Anson G. P. Dodge, William Jay Hunt and Samuel Scholefield, bankrupts, whose claims have been proved, witnesseth, that the said Anson G. P. Dodge, William J. Hunt and Samuel Scholefield aforesaid, hereby convey, transfer, and deliver all their and each of their estate and effects to John L. Cadwalader, as trustee, absolutely, to have and to hold the same in the same manner and with the same rights in all respects as the said Anson G. P. Dodge, William Jay Hunt, and Samuel Scholefield, or either of them, would have had or held the same if no proceedings in bankruptcy had been taken against them or either of them; the same to be applied and administered for the benefit of the creditors of the said Anson G. P. Dodge, William Jay Hunt, and Samuel Scholefield, the bankrupts aforesaid, in like manner as if said Anson G. P. Dodge, William Jay Hunt, and Samuel Scholefield had been at the date hereof duly adjudged bankrupts, and the said John L. Cadwalader, trustee, had been appointed assignee in bankruptcy under the Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States:" approved March 2nd, 1867.

It is conceded that the real estate of the bankrupts in Canada would not pass to the assignee in bankruptcy or be affected by any provision of the Bankrupt Law of the United States. But it is contended that this deed, upon the ordinary principles of law applicable to grants of land in this Province, was operative as a conveyance from Dodge to the trustee of the lands now in question, and that although the evidence given of the bankrupt law and of the proceedings under it does not otherwise assist the operation of the deed, it establishes that it was made for sufficient consideration, viz., the payment of the debts of the bankrupts.

I agree with the learned Vice-Chancellor that a sufficient consideration appears, and that the words "convey, assign, and deliver" are operative words of conveyance. The judgment is not impugned on these grounds, as although

they were taken in the formal grounds of appeal, they were not pressed in argument before us. I am not disposed to dispute the effect given to the word "estate," as sufficient to include lands or real estate, although I have not been able to find any precedent in which lands have been held to pass under a deed by force of that word alone. The nearest authority for so holding, which I have seen, is that passage from *Cruise's Digest*, cited by the Vice-Chancellor; though the object of that dictum is not to illustrate the effect of the word by itself, but to shew that a description such as "all that the estate in the tenure of J. S.," though at first uncertain, may be made certain by evidence: 4 *Cruise Dig.* 269, pl. 55. An instance of the use of the word *estate* as synonymous with lands, is found in an Irish deed which is set out in *Moore v. Magrath*, 1 Cowp. 9. The deed conveys certain undivided moieties, "together with all other the said Michael Moore's lands, tenements, and hereditaments in the Kingdom of Ireland." Habendum the said undivided moieties, "together with all other the said Michael Moore's estate in the Kingdom of Ireland."

I further agree that the general description "all the estate" is not objectionable, and will extend to cover the lands owned by the bankrupts in Canada as well as in the United States, unless restrained in that respect by the effect of the whole instrument. But I also think that it is apparent from the deed itself that only lands in the United States can properly be held to pass under it.

The general words must be construed with reference to the intention shewn by the deed as a whole. This principle has been acted on and illustrated in many cases, and amongst others in those to which I am about to refer. In *Moore v. Magrath*, 1 Cowp. 9, the Court of Queen's Bench held, in Error from the Queen's Bench in Ireland, that the general words which I have already quoted from that case, were restrained by the intention apparent from the deed, to grant only undivided moieties of an estate held by the grantor in right of his mother, and did not operate to pass his paternal estate.

In *Payler v. Homersham*, 4 M. & S. 423, a general release, executed by creditors in consideration of a composition which was recited, was held on demurrer only to extend to the debt set opposite the name of the creditor, and not to another debt which it was averred was not intended to be released. Lord Ellenborough said that common sense required that the general words of a release may be restrained by the particular recital; and in order to construe any instrument truly you must have regard to all its parts, and most especially to the particular words of it.

In *Doe Meyrick v. Meyrick*, 2 C. & J. 223, Lord Lyndhurst quotes, as the rule of decision from *Plowden's Commentaries*, fol. 106, in *Hill and Granger's Case*, that "*ex precedentibus et consequentibus optima fiat interpretatio*," and that "*benignæ faciendæ sunt interpretationes*;" and the same to be according to the intention of the parties." The point in *Doe v. Meyrick* is thus shortly stated by Parke, B., in *Ringer v. Cann*, 3 M. & W. at p. 348: "The object of the parties was, to pass only a particular estate, and the general words were restricted so as to meet the obvious intention of the parties." I may remark, by the way, that by "particular estate" the learned Baron meant a specific parcel of land.

In *Rooke v. Lord Kensington*, 2 K. & J. 753, 2 Jur. N. S. 755, Wood, V. C., said: (I quote from the Jur., p. 757) "Now the Courts, it is true, have held that clear words of conveyance in the operative part cannot be cut down by a recital. But then the clear words of conveyance are to be the subject of interpretation in each case." The conveyance in that case was of the lands comprised in certain mortgages, "and all other lands, if any, of which he was seized for an estate of inheritance in the county of Middlesex." Lord Kensington was seized of valuable lands in Middlesex not comprised in the mortgages. It was held that they did not pass, upon reasoning as to the intention apparent from the deed. And in *Jenner v. Jenner*, L. R. 1 Eq. 361, the same very eminent Judge held that the words

“and all other the freehold hereditaments, if any, in the county of York, of or to which the said R. F. J. is now seized or entitled” were confined to such hereditaments as were derived from Peter Birt’s will: that intention being gathered from the instrument.

Now, referring to the deed before us, we observe that it is entitled in bankruptcy: that it is made in terms of the section of the Bankrupt Act which I have extracted: that the estate and effects are conveyed to the trustee to be applied and administered for the benefit of the creditors in like manner as if the bankrupts had been at its date adjudged bankrupts, and the trustee appointed assignee in bankruptcy under the Act of Congress.

We find from the Act that no difference is intended in the effect of the assignment to the trustee, whether the bankrupt or the assignee is the channel of conveyance. In this case the bankrupts conveyed because of the accident that no assignee had been appointed. There would be no pretence for imputing to a conveyance by the assignee in bankruptcy any operation beyond the limits of the United States. Reading the conveyance and the statute together, and keeping in mind the undisputed fact that the parties, in making the deed, were acting solely under the statute, the intention of the deed may, without violence to its language, be put in these words, “We convey to the trustee in order that the same creditors may have the same benefit from our estate and effects as if the trustee were assignee in bankruptcy;” or putting the same thing in words equivalent in meaning, but more directly pointed at the subject of the present contest: “We make this conveyance so that the creditors may have through the trustee the same benefit from our estate and effects as they would have through an assignee in bankruptcy.”

I have only further to add that, while I am satisfied that this is the true reading of the deed, there is not a word in evidence to suggest that at the date of the deed any one supposed its effect to be different; although at a later date, and after the *fi. fa.* was in the sheriff’s hands,

Dodge, the bankrupt, became party to a deed of confirmation which affected to treat the Ontario lands as included in the earlier deed; and that to my mind there is affirmative evidence, whatever weight it may be entitled to, that no such supposition could have been entertained.

The statute requires the deed to be made under an order of the Judge and under oath. The Judge made the order prescribing the form of the deed, and also prescribing a form of oath by which the bankrupts were to swear that they had conveyed, assigned and delivered all their property to the trustee. The deed was executed, but the oath was not taken.

The Judge was acting within his jurisdiction. He could not deal and did not assume to deal with lands in a foreign country. There is no reason to suppose that he even knew of the Ontario lands, much less that he had any idea that the deed would affect them. Neither is there any reason to suppose that Dodge entertained the idea that the deed had any such operation. The absence of the oath favours the contrary inference. Dodge knew of the Ontario lands; and although required to swear that he had conveyed all his property he did not do so. Why did he disobey both the Act of Congress and the order of the Judge in this particular? The inference would not be a strained one, that it was because he was conscious he had not conveyed his Ontario estate.

I think the appeal should be allowed with costs, and the bill dismissed, with costs.

BLAKE, V. C.—The bill proceeds upon the proposition that by the instrument of the 14th of February, 1874, the premises in question became vested in Cadwallader as trustee: that the deed of the 24th September, 1874, operated as a further assurance thereof, and that the plaintiff, as substituted trustee, is entitled to these lands as part of the estate he thus represents. On this the plaintiff bases his right to restrain the defendants' execution, which had been placed in the sheriff's hands between the date of these

two instruments, from interfering with this property. It was admitted in argument, and is clear on authority, that, under the ordinary proceedings in bankruptcy, no title to real estate, beyond the territory in which the debtor is declared bankrupt, passes. It was also admitted, and is equally clear, that these lands did not pass under the instrument of the 14th February. This document is in the form prescribed by the Act, where the property that ordinarily passes to a trustee in bankruptcy is sought to be affected. There is nothing to shew the bankrupt intended to pass more—no evidence on the subject is adduced. I think the defendants are entitled to call upon the plaintiff to shew distinctly that, at the time of the execution of the last mentioned instrument, it was intended thereby to affect the lands in question, before it can be made, as against an intervening execution, effectual for this purpose. The plaintiff not having proved this, the bill should be dismissed with costs.

Moss, J. A., concurred.

Appeal allowed.

ROONEY ET AL. V. LYONS.

Insolvent Act of 1875—Withdrawal of claim—Composition and discharge—Confirmation of—Fraud—Secs. 63 & 136.

To a plea of a discharge under the Insolvent Act of 1875, confirmed by the Judge, the plaintiff replied that the defendant purchased the goods sued for on credit at a time when he knew himself to be unable to meet his engagements, which fact he concealed from the plaintiffs with intent to defraud the plaintiffs of the said goods.

The 63rd section of the Insolvent Act of 1875 declares *inter alia* that a discharge under the Act shall not apply without the express consent of the creditor to any debt for enforcing payment of which the imprisonment of the debtor is permitted by the Act.

The 136th section enacts that a person guilty of what was charged in the replication shall be guilty of a fraud, and liable to imprisonment, "provided always that in the suit or proceeding taken for the recovery of such debt the defendant be charged with such fraud, and be declared guilty of it by the judgment rendered in such suit or proceeding.

The case was tried without a jury, and the Judge left it for the Court to say whether, upon the facts as found by him, the defendant was guilty of fraud.

Held, on appeal from the judgment of the Queen's Bench, 40 U. C. R. 366, which was affirmed, that the judgment referred to in section 136 is the verdict of the jury, or the judgment given at the trial by the Judge, if the case is tried without a jury; and that the replication must fail, as the defendant had not been found guilty of fraud at the trial.

Evidence, which is fully set out in the judgment, was given to prove that the deed was not executed by the requisite proportion of creditors in number and value, owing to a claim having been improperly withdrawn.

Held, that the confirmation of the deed was final and conclusive, and that this Court could not go behind the Judge's order.

Semble, that, under the evidence stated in the case, the claim could not be considered as withdrawn.

THIS was an appeal from the judgment of the Court of Queen's Bench making absolute a rule *nisi* to enter a verdict for the defendant, reported in 40 U. C. R. 366. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were:

1. That the plaintiffs, having proved that the defendant was indebted to them, ought not to be debarred from recovering by anything shewn in the defence.

2. That the evidence shewed that the composition deed was not signed by the requisite number of creditors in number and value, and that it ought not to prevail against the plaintiffs' claim.

3. That the evidence shewed that the receiver of the estate of J. & J. White had proved the claim of that estate, and that the said proof enured to the benefit of the sureties for the said claim and could not be withdrawn to the prejudice of the sureties, nor could they withdraw simply because they had some other person liable as surety to them, and it is certain that one of the claims had no security on the estate, and it is not sufficiently proved that either had: Sec. 80, Insolvent Act of 1875; *Ex parte Parr*, 1 Rose 76; *Ex parte Goodman*, 3 Madd. 373.

4. That it was a condition of the deed of composition that the same should not be valid until it had been signed by the requisite proportion in number and value of the creditors, and that it never has been signed by the requisite proportion.

5. That a large number of creditors proved their claims after the said application for discharge to the Judge; and that when they are taken into account, the deed has not been signed by the requisite proportion in number and value of the creditors of the insolvent who have proved their claims.

6. That the withdrawal of the said claim would have been a fraud on the other creditors, who had not yet had time to prove their claims, in diminishing the apparent number of creditors with proved claims, and thus facilitate the discharge of the insolvent before all the creditors had time to prove their claims.

7. That the said claim was regularly proved as required by the Act, and the receiver had no right to withdraw the proof without an order from the Court for that purpose. See Insolvent Act of 1875, secs. 104, 95; *Grugeon v. Gerrard*, 4 Y. & C. 119.

8. That the plaintiffs' second and third replications to the defendant's plea were proved at the trial, and entitle the plaintiffs to a verdict.

The following were the respondent's reasons against the appeal:—

1. The respondent contends that the judgment of the Court below is correct, and should not be reversed, but

permitted to stand, because the defendant succeeded in establishing the defence disclosed in and by the plea to the declaration of the plaintiffs, and in proving that the deed of composition and discharge, in the said plea mentioned, was executed by the requisite proportion in number and value of the creditors of the defendant, within the meaning of the Insolvent Act of 1875.

2. That the evidence adduced at the trial shewed that the claim of the receiver of the estate of J. & J. White was not proved before the assignee in insolvency of the defendant, but was only in a position to be considered as proved unless contested, and that the proof of the same was contested by objection being made thereto; and that the said receiver thereupon elected to withdraw the said claim, and did accordingly withdraw the same, as he lawfully and properly might; and the said claim being so withdrawn and excluded from the claims proved, there was clearly the said requisite proportion in number and value of the creditors of the defendant who executed the said deed of composition and discharge: Insolvent Act of 1875, secs. 104, 49, and 52.

3. That even if the said claim of the receiver of the estate of J. & J. White were to be considered as proved in the first instance, the said receiver had a right to withdraw and did withdraw the same and the proof thereof before the execution of the said deed, the authority of the Court to expunge the proof of a claim being necessary only when the party proving the same seeks to prove the claim again in a manner different from and more advantageous to himself than the former proof, which was not the case here; and the proof of the said claim being therefore properly withdrawn by the said receiver, the same cannot be considered as a proved claim; and exclusive of the said claim of the said J. & J. White, there was the said requisite proportion of the said creditors who executed the said deed: Insolvent Act of 1875, secs. 49 and 52; *Grugeon v. Gerrard*, 4 Y. & C. 119; *Deacon's Law of Bankruptcy*, 232.

4. That the second and third replications of the plaintiffs were not proved at the trial, and even if they were proved

this would not entitle the plaintiffs to succeed, or be any reason for the reversal of the judgment of the Court below.

5. That upon the whole case, the defendant was entitled to succeed in his defence.

The case was argued on the 19th June, 1877 (*a*).

M. C. Cameron, Q. C., (*Monkman*, with him), for the appellant. Our contention shortly is, that after a creditor has proved his claim he has no power to withdraw it. If this be so, it is clear that the deed was not executed by a sufficient proportion of creditors in number or value. It appears that *Laidlaw's* reason for withdrawing his proof was that the claim was objected to on the ground that he held security; but admitting his right to withdraw in a case where his rights alone were affected, he could not do so here, as under the 80th section of the Insolvent Act of 1875, the sureties were entitled to have the benefit of his proof. The assignee could not have considered that the claim was withdrawn, as it was included in the amount and schedule of proved claims furnished to the Judge on the application for a discharge. Under such circumstances the Judge had no power to confirm the deed, and he should have refused to receive verbal explanation concerning the withdrawal of the claim. The evidence shews that the defendant was insolvent when he purchased the goods sued for in the third count, and we are entitled to recover thereon, as section 63 of the Insolvent Act of 1875, enacts that in such a case a discharge is no defence. They cited *Seller v. Price*, L. R. 2 Ex. 189.

Ferguson, Q. C., for the respondent. It cannot be held on the facts shewn that the claim was ever proved. At most it was only in a position to be objected to by creditors. But if it was a proved claim it ceased to be so on objection being made thereto. *Grugeon v. Gerrard*, 4 Y. & C. 119, shews that even when a creditor has proved he may withdraw his proof, if he does not intend to prove again in order to gain an advantage. *Ex Parte Williams*, L. R. 18 Eq. 373,

(a) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and PROUDFOOT, V.C.

also supports this view of the law. The fact that the claim appeared on the papers, which were before the Judge when the deed was confirmed, was the fault of the assignee, and the insolvent should not be prejudiced thereby. The sureties were not injured by the withdrawal, as by the 80th section of the Act they are only entitled to avail themselves of the proof after they have paid, if the claim has been proved, if not, they can prove themselves. The objection to the confirmation is now too late as the matter is *res judicata*, the order of confirmation being final and conclusive. The plaintiffs cannot succeed on the third count under section 63, as that section, read in connection with sections 136-137, shews that fraud must be charged in the declaration, and that the defendant must be found guilty at the trial; but no such verdict was rendered. The Chief Justice left it for the Court to say whether, on the facts as found by him, the defendant was guilty of fraud.

September 15th, 1877 (a). PATTERSON, J. A., delivered the judgment of the Court.

There are three counts, the first and second being upon promissory notes for \$206.15 and \$130.04, and the third being the common money count.

The only plea is one which sets up a deed of composition and discharge under the Insolvent Act of 1875, not executed by the plaintiffs.

Issue is joined on this plea, and the question contested under it is, whether the deed is executed by the requisite proportion of the creditors.

There are also several special replications, but no question is raised before us upon any of them except two which are confined to the third count. They are based on section 63 of the Act of 1875, which declares, amongst other things, that a discharge under the Act shall not apply, without the express consent of the creditor, to any debt for enforcing the payment of which the imprisonment of the debtor is

(a) *Present*.—BURTON, PATTERSON, MOSS, JJ.A., and PROUDFOOT, V.C.

permitted by the Act. And they allege that the defendant purchased the goods, the price of which is the debt charged under the indebitatus count, from the plaintiffs for himself on credit, at a time when the defendant knew (as averred in one replication, or *believed*, as averred in the other), himself to be unable to meet his engagements, which fact he concealed from the plaintiffs, with intent to defraud the plaintiffs of the said goods.

Under section 136, any person guilty of what is here charged, or of some other cognate offences mentioned in the section, shall be held to be guilty of a fraud, and shall be liable to imprisonment for such time as the Court may order, not exceeding two years, unless the debt and costs be sooner paid: provided always that in the suit or proceeding taken for the recovery of the debt the defendant be charged with the fraud, and be declared to be guilty of it by the judgment rendered in such suit or proceeding.

The judgment here referred to is either the verdict of the jury or the judgment given at the trial by the Judge if the case is tried without a jury, as is evident from section 137 which requires the Judge, immediately after the verdict rendered against the defendant for such fraud, if such verdict is given, or, if not before a jury, then immediately upon his rendering his judgment in the premises, to adjudge the term of imprisonment which the defendant shall undergo, adding, "But such judgment shall be subject to the ordinary remedies for the revision thereof, or of any proceeding in the case."

The learned Chief Justice who tried the case entered a verdict for the plaintiffs for \$588, an admitted amount. On the subject of the replications he found that the defendant was utterly insolvent for several years before January, 1876, when he got the goods. That he never took stock since 1872. That if ignorant, as he swore he was, of his position till February, 1876, it must have been wilful ignorance or blindness, that is, an ability at any moment to ascertain how he really stood, a knowledge he was getting rather worse than better, and yet a neglect of ascertaining knowledge so

very important ; and he noted that it was for the Court to say whether that came within the statute, even accepting the defendant's statement that he did not in fact know his state ; and that it seemed most reckless trading.

The verdict was entered for the plaintiffs, on the ground of the insufficiency of the deed of composition and discharge.

The rule *nisi* in the Queen's Bench asked to set aside that verdict and to enter a verdict for the defendant, on the ground that the deed was sufficient, making no allusion to the replication ; and the judgment of the Court, making that rule absolute is confined to the same matter.

It has now been urged before us that the plaintiffs should, at all events, succeed upon the money count, because they proved their replications.

It is quite clear that we cannot give effect to this contention. Under the provisions of section 136, to which I have just referred, the imprisonment of the debtor is not permitted unless he be declared to be guilty of the fraud by the judgment rendered at the trial. No such judgment was rendered, and the finding of the learned Chief Justice stops short of the essential fact of the intent to defraud.

How can we deal with the matter ? If it is to be taken as coming before the Court on leave reserved, there can be no question that the facts found are not sufficient to support a conviction. If it is suggested that the Queen's Bench ought to have acted on the evidence and pronounced a verdict which the Judge at the trial should have pronounced, or that in effect the judgment for the defendant must be taken as involving a decision of the question against the plaintiffs, two questions arise. *First*, do the Law Reform Acts apply to the case ? This has not been argued, and I express no opinion upon it. *Secondly*, if they apply, is there an appeal ?

Our decision in *Trumpour v. Saylor*, 1 App. R. 100, is applicable to this case. The question is entirely one of evidence—a jury question—from which there is under the present law no appeal, although provision has been made by the Act of last session, 40 Vic. ch. 7, O., for a change in this respect when the revised statutes come into force.

The question of the sufficiency of the deed is also one of evidence, but it is rather a question of the admissibility of evidence, or of the legal effect of it, than a mere question of fact.

A Mr. Laidlaw, who was receiver for the estate of one White, a creditor of the defendant, attended the first meeting of creditors and made the proof required by section 104 of the debt which he represented. He furnished his claim to the assignee in the required form, attested under oath and accompanied by the vouchers on which it was based. Section 104 declared that upon this the claim should be considered proved unless contested. He took part also in the meeting, voting in the choice of an assignee as a creditor who had proved his claim. If this claim so proved be taken into account, the deed of composition is not signed by the requisite proportion of the creditors. If the claim be excluded the deed is sufficient.

It happened that after what I have mentioned had taken place at the meeting, Laidlaw was informed that the claim was a secured claim, a fact of which he had not before been aware; and he then stated that he withdrew his proof. He took no further part in the business of the meeting; and two days afterwards he applied to the assignee for the promissory notes which had been attached as vouchers to his affidavit, and they were given up to him. The affidavit seems to have remained with the assignee; the assignee entered the claim on his list of proved claims; and afterwards, when he furnished a certificate under section 52 of the Act for the purpose of the application, under section 53, for the confirmation of the discharge, he included the claim both in his statement of the amount of proved claims, and in the schedule of the proved claims.

It seems quite certain from the evidence that looking at the deed itself, and at all the materials which the statute directs to be furnished and which were furnished by the assignee to the Judge, and which are evidently intended to be those on which the Judge is to act, the deed was insufficient, and the discharge ought not to have been confirmed.

There seems, however, to have been verbal information given to the Judge that Laidlaw's claim had been withdrawn, or, more properly, that he said he had withdrawn it, and upon that he acted and granted the confirmation.

The learned Chief Justice at the trial held that under these circumstances the proof could not be considered as withdrawn, and that therefore the deed was insufficient. The Court of Queen's Bench took a different view.

I am strongly of opinion that the view taken at the trial was correct. It would be permitting a dangerous laxity to hold that, with all the written evidence one way, and that evidence having, in addition to the fact of its being written, the sanction and authority of the statute under which it is furnished, a different state of facts can be found on mere verbal statements. It is not easy to understand why some order was not made by the Judge, or some correction of the assignee's schedule and certificate required, or something done to place the confirmation in harmony with the other formal proceedings, and prevent the contradiction which now appears.

Whatever opinion I might be inclined to entertain of the honesty of the statement of the withdrawal of the proof which was never in fact withdrawn, I should not in a suit such as this act upon it, if the matter was open, but would leave the parties to take such proceedings in the insolvency matter as would leave no room for question hereafter that the claim really was out of the way, and would make the proceedings truly represent what is alleged to be their true position. Until that was done I should treat the written evidence as conclusive.

I find myself, however, compelled to accede to Mr. Ferguson's contention that we cannot go behind the Judge's order.

Under the former Insolvent Acts, viz., the Act of 1864 sec. 9, sub-sec. 9, and the Act of 1869 sec. 104, the confirmation of the deed of composition and discharge, if not reversed in appeal, was declared to render the discharge thereby confirmed final and conclusive.

Referring to the Act of 1864, Hagarty, J., delivering the judgment of the Court, in *Thompson v. Rutherford*, 27 U. C. 205-209, said: "We think the effect of the statutes is quite plain. The discharge, or composition, or confirmation, if not appealed against, appears to be final and conclusive as a discharge as to all matters anterior to the matters mentioned in the 13th sub-section above cited; but is avoidable if obtained by fraud, &c."

In *Shaw v. Massie*, 21 C. P. 266-270, Gwynne, J., said: "It was argued that the discharge, being confirmed by the Judge, has, by the operation of the 104th section, become fixed and conclusive, and that it is not competent for the plaintiff now to make any objection to the deed. I can understand the propriety of providing that a discharge when confirmed shall, finally and conclusively, be taken to have been executed by the proper proportion of creditors necessary to give it any validity; but I cannot imagine that the Legislature contemplated that a confirmation by a Judge should give to a deed, or consent in writing, any greater effect than is provided for in the deed or consent itself," &c.

And Hagarty, C. J., said, at p. 276: "There remains the effect of the confirmation under the Act, which, it is said, is to be 'final and conclusive.' I do not think that on the pleadings before us we can hold the plaintiff barred by that provision."

From these cases, to which I may add *McLean v. McLellan*, 29 U. C. R. 548, it appears that under the former Acts the order of confirmation would have been held conclusive as against the present objection. The present Act does not contain any clause in the words of sub-section 9 or section 104, to which I have referred, but the effect of the Act must be the same.

By section 66 the discharge has no effect until confirmed by the Court. By section 53 any creditor, or the assignee, under the authority of the creditors, may appear and oppose the confirmation. By section 56 the insolvent shall not be entitled to a confirmation of his discharge, or of a deed of composition and discharge if it appears to the Court or

Judge (*inter alia*) that he has not obtained the assent of the proportion of his creditors in number and value required by the Act to grant the discharge, or enter into the deed of composition and discharge. By section 57 the Court or Judge, as the case may be, upon hearing the application for confirmation of the discharge, the objections thereto, and any evidence adduced, shall have power to make an order, either confirming the discharge or annulling the same, according to the effect of the evidence so adduced; and power is given to modify or suspend the discharge. By section 128 an appeal is given to any party to any contestation, matter or thing upon which a Judge has made any final order or judgment. And by section 61 "the confirmation of the discharge of a debtor in the manner herein provided, shall absolutely free and discharge him, after an assignment, or after his estate has been put in compulsory liquidation by the issue of a writ of attachment, from all liabilities whatsoever (except such as are hereinafter excepted) existing against him and provable against his estate, whether the same be secured," &c.

It is clear that the whole jurisdiction exists under the provisions of the Act, and that the order for confirmation having been made and acquiesced in, or, if appealed from, confirmed in appeal, must be taken as conclusive upon all matters preliminary to its making.

If this were not so, we might occasionally have a judgment of this Court, affirming in appeal an order confirming a discharge as against an objection such as that now raised, questioned in the Division Court.

The appeal must be dismissed, with costs.

Appeal dismissed.

BROWN V. GREAT WESTERN R. W. CO.

R. W. Co.—Two lines crossing—Collision—Air brakes—Negligence—Statutory duty—Consol. Stat. C. ch. 66, sec. 143.

The plaintiff, a conductor of a Grand Trunk Railway train, was injured while his train was crossing the track of the defendants' railway on a level by the defendants' train running into it. On approaching the crossing, the defendants attempted to stop their train by the air brakes, but, owing to the bursting of a tube, they failed to act, and although every effort was made to stop the train with the hand brakes and by reversing the engine, a collision occurred. It was shewn that these brakes were the best known appliance for stopping trains: that they were in common use on railways: that they had been properly examined and tested during the day: and that the defect arose from no want of care on the part of the defendants.

Sec. 143 Consol. Stat. C. ch. 66, enacts that "every locomotive * * or train of cars on any railway shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes."

Held, Moss, J. A., dissenting, affirming the judgment of the Queen's Bench, 40 U. C. R. 333, that the plaintiff was entitled to recover.

Per HAGARTY, C. J. C. P., and GALT, J.—The statute imposed an absolute duty on the defendants to stop for three minutes, and that their omission to do so rendered them liable to the plaintiff, unless it was shewn to have been caused by the act of God or inevitable necessity.

Per PATTERSON, J. A.—The defendants were guilty of negligence in not applying the air brakes at a sufficient distance from the crossing to enable the train to be stopped by other means in case of these brakes giving way.

Per Moss, J. A.—There was no evidence of negligence, as the defendants had provided their train with the best known description of brakes, and used them with care, and they were under no obligation to have hand brakes at all.

Quære, per Moss, J. A., whether it was open to the plaintiff to rely upon the breach of the statutory duty, having based his action on negligence, and the only issue on the pleadings being, whether the defendants were guilty of negligence. *Quære*, also, whether the plaintiff could complain of defendants' neglect of the statutory duty if, as might be inferred from the evidence, he, being a conductor of the other train, had also neglected it.

THIS was an appeal from the Court of Queen's Bench discharging a rule *nisi* to set aside the verdict for the plaintiff, reported 40 U. C. R. 333. The facts are fully stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were:

1. The appellants contend that the verdict is against law and evidence, and that the rule *nisi* should have been made absolute.

2. That it was not shewn that they were guilty of any negligence.

3. That the decision of the Court of Queen's Bench amounts substantially to this, that the defendants were guilty of negligence in using air brakes at all, and the appellants contend that this conclusion is not warranted by the evidence.

4. The words used by the Chief Justice, that "The air brakes, although highly approved and much used in this country and elsewhere, are, as is well known to railway men, not absolutely safe," may, of course, be applicable also to everything used in railways. Absolute safety cannot be guaranteed to any person travelling on railways.

5. But it is contended that if the air brake is to be used at all, it cannot be in the mode suggested by the Court—that is to say, to be applied at such a distance from the point of danger, or, in other words, from the point where it is intended to stop the train, as to give the opportunity of using either or both description of brakes; and that their not doing so was not an act of negligence, and that if it is necessary that such precautions should be taken the air brake cannot be used at all with advantage to the public.

6. In the ordinary use of brakes they are applied at such a distance from the proposed stopping place as to bring the train to a standstill when the stopping place is reached; and, of course, when the distance at which it is necessary they should be applied is lessened, time is saved. If the air brakes can stop the train in less time than is required by the ordinary brakes, they are so far an improvement. But if an experiment must be made to test their safety at each stopping place no time would be saved by them, and the only question, therefore, to be tried is, are the appellants guilty of negligence when they use the air brakes in the way in which it was contended they should be used, and in the only way in which it is worth their while, or for the benefit of the public, to use them?

7. The appellants contend that they are not guilty of negligence in so using them, and that the evidence shews

that they are not guilty of negligence in making use of them on their railway.

8. The bursting of the pipe which caused the injury was not and could not be known before ; for it seems to have taken place after the speed of the train had been partially slackened by the brakes, and, therefore, was an accident against which the appellants could not by the use of ordinary precautions provide.

9. At the time when the defect in the air brake was discovered, the defendants' servants could have stopped the train in the usual manner had the air brake been then in good working order. They had reason to rely upon its being in good working order, and upon their ability to control the train, and it was not negligent on their part to so rely upon it.

10. Speed is one of the objects aimed at in railway travelling, and Railway Companies are justified in adopting improvements which have a tendency to effect this object. And the appellants contend that when they adopt such improvements after they have been tested and approved by skilled persons competent to judge, and recommended after long use, they are not guilty of negligence because an accident occurs in the giving way of some parts of the machinery which they could not foresee or prevent.

And they contend that the use of the air brake is a justifiable use of one of the latest improvements, and that they were not guilty of negligence either in adopting the said improvement or in their mode of using it.

And they will, in addition to the cases cited in the judgments, rely upon the following cases :—

Toomey v. London, Brighton and South Coast R. W. Co., 3 C. B. N. S. 146 ; *Sweeney v. Ohio and Cleveland R. W. Co.*, 10 Allen 368 ; *Cornman v. Eastern Counties R. W. Co.*, 4 H. & N. 781 ; *Smith v. Great Eastern R. W. Co.*, L. R. 2 C. P. 4 ; *Loop v. Litchfield*, 42 N. Y. 351 ; *Wharton on Negligence*, secs. 32, 635, 822, 823 and 824.

The following were the respondent's reasons against the appeal :—

1. The respondent contends that the verdict was right and according to law and evidence, and that the rule *nisi* was therefore properly discharged.

2. That it was shewn that the appellants were guilty of negligence in not applying the brakes on their train in time, and so caused the accident whereby the respondent was injured.

3. That it was not shewn, nor was it contended by the appellants, that their train stopped before coming to the place where the Grand Trunk Railway crosses their track for the space of three minutes, as provided by Statute, whereby the accident which injured the respondent happened ; and that the appellants were guilty of negligence in this.

4. That it was shewn in evidence that air brakes such as used by appellants on their train do become defective, and when the defendants found that the said air brakes had become defective, they should have applied the hand brakes on said train, which they did not do ; and had they done so immediately after the bursting of the air brakes, as they were in duty bound to do, the collision whereby the respondent was injured would have been avoided, whereby the appellants were guilty of negligence.

5. That it is the duty of the appellants to use the best known and and safest appliances for the stopping of their trains, and it was shewn in evidence, as is the fact, that had the ordinary hand brakes been relied upon on the occasion when the collision occurred, the accident would not have happened ; but the appellants, in trusting to the air brakes, which, as was shewn by the evidence given upon the trial hereof, do become defective, instead of making use of the hand brakes, which are safer and more reliable, were guilty of negligence.

6. That it was the duty of the appellants to apply the air brakes a sufficient distance from the crossing to enable them to use the hand brakes in case of the failure of the air brakes to stop the train before passing over said crossing, and their omission to do this on the occasion referred to was and constituted negligence.

7. That the appellants were bound to stop their train before passing the crossing for upwards of three minutes; that they did not apply the air brakes in time to stop safely before crossing, and in that were guilty of negligence.

8. That the appellants were guilty of negligence in approaching the said crossing at the high rate of speed—to wit, twenty-five or thirty miles an hour—at which their said train was then running, and they were guilty of negligence in running said train at so high a rate of speed in approaching their crossing.

9. And the respondent also relies on the reasons and authorities in the judgments of Mr. Justice Burton at the trial of this cause, and of the Chief Justice of Ontario on the argument of the rule in Term, and on the cases in said judgments referred to.

The case was argued on the 20th of June, 1877 (a).

M. C. Cameron, Q. C., for the appellants.

W. Rock, Q. C., for the respondent.

The arguments sufficiently appear in the reasons for and against the appeal.

The following additional cases were cited: *Costello v. The Syracuse, &c., R. W. Co.*, 65 Barb. 93; *Templeman v. Haydon*, 12 C. B. 507; *West Chester and Philadelphia R. W. Co. v. McElwee*, 67 Penn. 311; *Philadelphia R. W. Co. v. Zug*, 47 Penn. 480.

September 15, 1877 (a). HAGARTY, C. J.—The facts are simple. The defendants' train was bound by law to stop at the semaphore, 150 yards from the junction or crossing of the two roads. The air brakes were applied at twenty or from twenty to thirty yards distant from the semaphore, the train then running at about twenty-five miles an hour. Steam was shut off about half-a-mile east of the semaphore, the engine driver stating that he was then going twenty-five miles an hour.

(a) *Present*.—HAGARTY, C. J. C. P., PATTERSON and MOSS, JJ. A., GALT, J.

At or about the semaphore it was found the air brakes had given in, and the signal "down brakes" was given and the engine reversed. The ordinary brakes were applied, but they could not stop the train, which ran into the Grand Trunk train at the crossing at a speed variously estimated at five to ten miles an hour.

The semaphore intimating that they must stop could be seen half a mile off. Then steam was shut off, the speed being twenty-five miles, but no application of air brake till within twenty or thirty yards of the place where the law required them to stop.

Evidence was given that these air brakes are considered the most effectual means of stopping trains, effecting the object in a far less time than the ordinary hand brakes, and that but for the giving way or bursting of the air pipe this train could have been easily brought up and the accident avoided: that, in fact, the Company had used all reasonable skill and care, and were not responsible for this unforeseen miscarriage.

It seems to me that the whole argument seems to proceed on the idea that the action stands on the same footing as that of a passenger suing the carrier for injury to person or property.

I think this claim stands on a different footing.

The defendants are bound by Consol. Stat. C., ch. 66, to do two things:—1st, by sec. 142, "to station an officer at every point on their line crossed on a level by any other railway, and no train shall proceed over such crossing until signal has been made to the conductor thereof that the way is clear." 2. By sec. 143 "every locomotive or railway engine or train of cars, on any railway, shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes."

These are statutable provisions for the protection of life and property, and, whether the statute does or does not impose any penalty for the non-performance thereof, or declares that the breach shall involve a civil liability to damages at the suit of those injured thereby, I think a right of action is given.

The injury to this plaintiff was clearly the result of the breach of the statutable orders. The defendants' train, instead of stopping at the signal, or absolutely at the semaphore, ran into the other train at the level crossing and injured the plaintiff.

In *Couch v. Steel*, 3 E. & B. 403, the right of action was recognized. A Statute required every ship to have a sufficient supply of medicine suitable to accidents and diseases arising on sea voyages, under certain penalties. A sailor brought an action for the non-observance, alleging special damage. The action was held to be maintainable. Lord Campbell's judgment is very full. He cites Statute of Westminster, 13th Ed. 1, giving a remedy by action on the case to all who are aggrieved by the neglect of any duty created by Statute, and also Com. Dig. Action on Statute (F).

Maxwell, on Statutes, 370, states the rule: "When a Statute imposes a new duty for the benefit of individuals, any person who is injured by the breach of the duty has impliedly a right to recover from the person on whom the duty is cast satisfaction for the injury done to him contrary to the Statute." He cites *Atkinson v. Newcastle Waterworks Co.*, L. R. 6 Ex. 404. There a Water Company was required by law to keep their pipes constantly charged to a certain pressure, and to allow parties to use the water for extinguishing fires; and it was held that a plaintiff could claim damages for not keeping the pressure up in the pipes, whereby plaintiff's premises were destroyed by fire, although penalties were provided by the Statute, and it was insisted the damages were too remote. *Couch v. Steel*, is approved and followed.

The remarks of Kelly, C. B., in *Gorris v. Scott*, L. R. 9 Ex. 128, may be referred to, though the decision was on a different ground.

I think the Grand Trunk Railway would have their action against these defendants for injury to their train caused by non-observance of the Statutable duty. So would the plaintiff, and any one else injured on that train.

Such an action is not based on any privity in any contract of carriage, express or implied, between carrier and passenger, and all the reasoning and authority as to the amount and extent of care and skilfulness required in such contract seems to me to be rather inapplicable.

There is no privity or contract, express or implied, in the case before us. The plaintiff sues for an injury directly flowing from defendants' breach of the Statutable directions in sections 142 & 143.

The defendants' train did not stop as directed, and plaintiff's injury was the direct proximate result of the very danger designed to be prevented by the Legislature—the collision of trains at a level crossing.

No *vis major*, or anything to be regarded as the act of God, or any inevitable necessity, prevented the stopping of the defendants' train, if such could be urged as a defence. The failure to stop was the result of defendants' misplaced confidence in the air brakes. We are not called on to discuss whether such confidence was or was not reasonably reposed in them. I refer to *Maxwell*, sec. 345; *Broom's Maxims*, sec. 238, commenting on "*Lex non cogit ad impossibilia*"; *Paradine v. Jane*, Aleyn 27; and the cases cited in *Chamberlen v. Trenouth*, 23 C. P. 499; *Eberts v. Smythe*, 3 U. C. R. 192.

In *Broom*, at p. 239, Sir William Scott's language is cited, from 2 Dodson 323, as to what necessity will excuse the performance of a duty. As to the act of God, *vis major*, &c., see *Nugent v. Smith*, L. R. 1 C. P., Div. 440.

Meek v. Whitechapel Board of Works, 2 F. & F. 144, was an action against defendants for injury caused by overflow of a sewer, which it was contended that under the Stat. 18 & 19 Vict. ch. 120, defendants were bound to cleanse. The declaration was framed merely on the breach of duty. Wilde, B., who tried it, refused evidence of contributory negligence by plaintiff, apparently holding the Statutable duty to be absolute, and asked the jury "was the overflow caused by defendants' neglect in not causing the sewers to be kept cleansed, or by a storm so sudden that no reason-

able care could provide against it?" The plaintiff recovered. I do not notice if the case was brought up in Term.

Fourteen years after, in 1874, *Hammond v. Vestry of St. Pancras*, L. R. 9 C. P. 3, was tried, on an apparently similar declaration for the same kind of injury under the same Statute. The defence was, that the sewer was wholly unknown to defendants. The jury found it was unknown, but with reasonable care it might have been known. It was a drain or sewer from three or four houses into a barrel drain which defendants knew of. The jury also found that defendants did not know of the obstruction, nor could it have been known by reasonable care. Verdict for plaintiff, with leave to move.

There was a full argument and judgment in Term by Brett and Denman, JJ. Sir W. Brett examined the Statute. He says: "If the 72nd section does throw upon the defendants an absolute duty or obligation to guarantee that the sewers shall be at all times kept cleansed, it follows that if any injury arises to an individual from their not being so kept the Vestry are liable. The question therefore is, what is the proper construction of the Act of Parliament? * * The declaration does not charge the defendant with being guilty of negligence * * and can only be a valid declaration if it can be supported upon the Statute. The words of section 72 are susceptible of either meaning—that an absolute duty is cast upon defendants, or, that they are only bound to exercise due and reasonable care." He then discusses the interpretation: * * "It is obvious that circumstances may arise in which a sewer, notwithstanding the exercise of reasonable care, may be obstructed. * * It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may, notwithstanding, be absolute; but, if so, it ought to be imposed in the clearest possible terms. The intention of the Legislature is to be gathered from the language used and the

subject matter. Where the language used is consistent with either view, it ought not to be so construed as to inflict a liability, unless the party sought to be charged has been wanting in the exercise of due and reasonable care in the performance of the duty imposed. According to my view of section 72, therefore, the vestry or district board are not to be held liable for not keeping their sewers cleansed at all events and under all circumstances; but only where by the exercise of reasonable care and skill they can be kept cleansed."

Referring to *Meek v. Whitechapel Board of Works*, 2 F. & F. 144, he says, that if Lord Penzance be rightly reported as holding the duty in that Statute absolute, he differs from him.

This seems a very reasonable exposition of the law.

In the case before us the duty is very pointedly declared, and it is of a very different character from that of seeing to the cleansing of miles of underground sewers, involving a large outlay of money.

I think the defendants cannot complain if we hold that the duty is absolute, unless rendered impossible by the act of God or inevitable necessity.

The duty imposed by Parliament is for public safety. There is nothing in this case to prevent its fulfilment. The air brakes seem an excellent contrivance for the purpose of pulling up a train in a much shorter time and space than the old system. In the event of danger of collision, &c., they may be invaluable for the safety of life and property. Their use also saves considerable time to defendants in pulling up more rapidly at their numerous stations. But, in all this I cannot see an excuse for the breach of the Statutory order of the Legislature to stop at a particular place to avoid a common danger.

The defendants' argument is, that they used the best known appliance to stop, as ordered, and that its unforeseen failure should not visit them with liability.

To this the persons injured on the other line may answer: "You could have obeyed the law by taking a little

longer time to do it, and thereby saved us from injury. We are not concerned in your economy of time, and claim damages for your breach of a provision wisely designed for our safety."

As observed by Sir William Brett in the case already cited: "The positive injunction of the law, if proved to be violated, can give way to nothing but the clearest proof of the necessity that compelled the violation."

I think the appeal should be dismissed, with costs (a).

PATTERSON, J. A.—I am also of opinion that this appeal should be dismissed. The plaintiff, a conductor of a Grand Trunk Railway train, was injured while the train was crossing the track of the Great Western Railway, by a train of the latter coming into collision with the Grand Trunk train. The statute Consol. Stat. U. C. ch. 66, sec. 143, requires that "Every locomotive or railway engine, or train of cars, on any railway, shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes." The proper signal was made for the train to stop. It was not stopped in obedience to either the statute or the signal. If it had stopped the accident would not have happened.

A distinct *prima facie* case is thus made out: *Couch v. Steel*, 3 E. & B. 402; *Atkinson v. Newcastle and Gateshead Water Works, Co.*, L. R. 6 Ex. 404; *Blamires v. Lancashire and Yorkshire R. W. Co.*, L. R. 8 Ex. 283. The question is, have the defendants so clearly exculpated themselves that we can say the verdict against them is wrong?

The facts are simple and are not really disputed. Each car of the train was provided with the ordinary brakes. If these had been used in time it cannot be doubted that

(a) Since the giving of this judgment the case cited of *Atkinson v. Newcastle Waterworks Co.* has been reversed in Error, L. R. 2 Ex. Div. 441, October, 1877, and the case of *Couch v. Steel* is seriously questioned by Lord Cairns, Cockburn, C. J., and Brett, J. It is not however overruled. Perhaps the distinction is that the penalty prescribed by the statute is the only remedy. The distinction between a special act and one of general public importance and for public safety is pointed out. Our Railway Act does not seem to provide any penalty.

the train would have been stopped. It is argued for the company that these might have failed; and it cannot be denied that mechanism of all kinds is liable to wear out, or become obstructed, or give way. But the supposition that all the brakes would fail simultaneously, or so many of them as not to leave enough to control the train, is too improbable to be entertained, and could scarcely be entertained without carrying with it the imputation of negligence. It may therefore be said that the persons in charge of the train had the means of securing obedience to the very important and salutary injunction of the statute. They relied, however, on the air brake, which if it had worked properly would have stopped the train in time. It failed, however, by reason of the bursting of a tube, and the collision became inevitable.

The air brake is described as an apparatus generally used and approved of among railway companies, and entirely used as a means of controlling all passenger trains. It acts simultaneously on the whole train, and enables a train to be brought in more quickly than with the other brakes. I understand by this that as the air brake acts more promptly than the ordinary brake in stopping the train, a high rate of speed can be maintained until nearer the stopping place than when the old brake is used, and so time is saved. Doubtless this facility in the control of the train is of great value in emergencies such as an impending collision; and, in the ordinary routine of stopping at stations, it must be the means of considerably economising time without involving any serious risk; as if a brake should give way the only consequence would be the carrying of the train past its stopping place.

We are informed by the evidence that the bursting of one pipe would prevent the stopping of the whole train; and that it is not an uncommon thing for defects to occur. One witness, the car examiner, says he has known them to burst probably as many as three or four times during the last year. There seems ample room for the conclusion from the evidence, that valuable as the air brake is, and

superior as it is in many of its qualities to the other brake, it is inferior in the certainty of its action, and more liable to fail at the critical moment; and its failure is the more serious as one defect involves the loss of control of the whole train.

It is shewn that there was no want of care on the part of the servants of the company in examining and testing the brake, and that it had done its duty well during the earlier part of the day. It gave way, however, at the critical moment, an occurrence for which no one seems to be able to account.

The position then is this. In approaching a level crossing of another railway, and with the option of controlling the train by the old brakes, or of applying the air brake at such a distance as that in case of its failure the others may be resorted to, the speed is kept up until so near the crossing that a sudden failure of the brake places the train beyond effective control. The obedience to the law and the safety of the passengers are left to depend on an appliance which, though usually effective, is known to be fallible; while, at a trifling sacrifice of time, another appliance might have been used which is practically infallible.

There is no point as to the use or disuse of the air brake in the general working of the road necessarily involved. The question relates only to the propriety of relying upon it in positions involving danger; or when the law requires, for the protection of the public and the avoidance of casualties, that the train shall stop.

The proper view may be that the defendants are bound at their peril to obey the statute by stopping; but even if this were not so, it would not have been possible to withdraw from the jury, if the case had been tried by a jury, the consideration whether in depending on the air brake in the particular position, all proper care had been taken to secure the performance of the duty to stop the train; or whether the defendants were not chargeable with negligence.

I think the learned Judge was right in holding that there

was evidence of negligence, and that his finding is fully supported by the evidence.

Moss, J. A.—The declaration charges that the defendants so negligently and unskilfully managed an engine and train upon a railway which the plaintiff was lawfully crossing in a railway carriage, that the said engine and train were driven against the carriage in which the plaintiff was, whereby he was injured. The plaintiff has thus distinctly founded his right of action upon negligence by the defendants in the management of their train, and the only issue raised upon the pleadings was, whether they were guilty of negligence. Nearly all the material facts are beyond dispute, and have been sufficiently stated in the judgments that have already been pronounced.

The learned Judge who tried the case held that the defendants, were responsible for negligence, on the ground that if they relied upon the air brakes “they should have applied them at a sufficient distance from the semaphore, so that in the event of their giving way the defendants might, by resort to other appliances and the reversing of the engine, have avoided the collision.” He added: “It is not sufficient for them to rely upon the air brakes, if, as in the present case, they are unable to control the train in time in the event of any accident occurring.” Upon the argument before the Court of Queen’s Bench the Chief Justice, adopting this view of the defendants’ duty, held that the air brakes must be applied at such a distance from the point of danger as to give the opportunity of using either or both of the two descriptions of brakes. viz., the air brake and the hand brake. In his opinion the defendants’ omission to apply them at such a distance constituted negligence. Morrison, J., who sat with the Chief Justice, dissented from this view, but withdrew his judgment in order to enable the defendants to appeal.

So far as I can perceive, the serious contest both at Nisi Prius and in Banc was confined to this question. It does not appear even to have been suggested that the defendants

were liable even if they were free from imputation of negligence, because there was imposed upon them by statute an absolute duty to stop for three minutes at the crossing, from which they could not be relieved by anything short of *vis major*. Now if the case is to be dealt with on the ground on which it is put in the declaration and argument, I confess that I entertain a strong opinion that it has entirely failed. In that aspect the defendants were no more liable to the plaintiff, than they would have been to a passenger on their own train, who had been injured by the collision. The plaintiff could not have claimed greater care, skill, and diligence on their part than could a passenger. If the action were by the latter I agree with the opinion that the doctrines enunciated in *Readhead v. Midland R. W. Co.*, L. R. 2 Q. B. 412, would have furnished a conclusive answer.

The defendants had provided the best known apparatus for bringing their train to a stop. They had been diligent in examining it and testing its efficiency. Its failure arose from some accident which could not have been foreseen and which no skill could have detected. In a word, the air brakes which they used were the best procurable contrivance for preventing a collision, and their unfortunate failure in the present case arose from no want of care or foresight in the defendants. Having provided their trains with the best description of brakes, I do not see that they were under any obligation to have hand brakes at all.

It appears to me that to lay down any such rule as that acted on by the learned Judge and sanctioned by the judgment in appeal, would amount to a prohibition of the use of this confessedly valuable description of brake. There would seem to be little utility in having air brakes, if they must be applied at such a distance from the point where it is intended to stop the train, as to give the opportunity of using either or both description of brakes.

It may probably occur to railway companies that if this rule be established it will be better to rely upon the hand brakes altogether. It is indeed suggested that this rule

need only be applied when a dangerous point is approached, but who is to determine what shall be deemed a dangerous point within the rule, and if an engineer and a jury differ in their estimate, is the railway company to be held guilty of negligence?

As I understand that two of my learned brethren take a different view of the defendants' liability, even on the ground I have been considering, this appeal must necessarily fail; but I think it right to add an observation upon the further ground, on which the majority of the Court are prepared to hold that the judgment is in any event correct. That ground, as I understand it, is, that the statute imposed upon the defendants an absolute duty to stop for three minutes, and that their omission to do so cannot be excused by any evidence short of the existence of some *vis major* which rendered obedience impossible.

This point was not discussed at the bar, and does not seem to have been precisely advanced at any stage of the case, although it is perhaps obscurely shadowed forth in one of the printed reasons against the appeal. The observations of the learned Chief Justice shew that there are cogent arguments for construing the statute as imposing an absolute duty, and if that be the correct view, there is perhaps no reason to feel any hesitation about the general legal result of such a legislative mandate. If I felt certain that this was the necessary construction of the enactment, I should probably be bound to hold that the failure of the air brakes was not an answer, although I am not at present prepared to assent to the unqualified proposition that the right of an aggrieved party to maintain an action is a necessary consequence of neglect of a statutory direction. It appears to me, however, that considerations of some—I am far from saying of sufficient—weight might be urged against this rigid interpretation, and I should like to hear the point fully debated before committing myself to an opinion. But the views which other members of the Court entertain upon the question of negligence make such a discussion unnecessary for the purpose of disposing of this appeal.

I may be permitted to add that even if this ground is now fairly open to the plaintiff, and if it is clear that an absolute duty to stop is imposed by the statute, and that neglect to fulfil it, accompanied by damage, would ordinarily give a right to sue, there may be reason to doubt the applicability of the doctrine to this case. Upon the evidence it does not appear to me to be clear that the plaintiff is entitled to complain of the failure to discharge such a duty. He may have been *in pari delicto*, and it may be a serious question how this would affect the rights he could otherwise assert. He was himself the conductor of the crossing train. The legislative injunction to stop for three minutes extended to him, as well as to the officers of the defendants. But I incline to think that the reasonable inference from the evidence reported by the learned Judge is, that he did not obey it, and that if he had done so the collision would not have occurred. From his statement I rather infer that having brought his train to a momentary stop, and the semaphore arm being then dropped, he immediately proceeded, assuming that the road was clear. If the plaintiff had based his right of action upon the breach of statutory duty, the true state of facts would no doubt have been elicited; and assuming it to accord with the hypothesis I have suggested, could he successfully contend that the defendants are chargeable for not having obeyed the statute, when if he had himself obeyed it, he would have escaped all injury?

For these reasons I am not prepared to concur in the judgment dismissing the appeal, although it may be that if the statute does impose an absolute duty, and if the plaintiff should now be permitted to rest his case upon non-performance of that duty, and if he is not debarred of relief by a personal disobedience of the statute, the general excellence of the air brakes would not exempt the defendants from liability. Upon the consequences resulting from these hypotheses I desire to abstain from expressing any opinion.

GALT, J., concurred with HAGARTY, C. J. C. P.

Appeal dismissed.

SHANNON V. THE HASTINGS MUTUAL INSURANCE CO.

Insurance—Misdescription of premises—Survey made by agent—Unreasonable condition—Further insurance—Mailing notice of—Presumption of receipt.

The plaintiff, upon an application for insurance being read over to him, objected to the distances stated in the diagram, which was endorsed on the application, of the contiguous buildings. The defendants' agent, who had prepared the diagram after a personal survey of the premises, promised to measure the distances and make the necessary alterations before sending it to the head office. The plaintiff thereupon signed the application, but the agent forwarded it without having made the corrections.

By one of the conditions of the policy it was provided that if an agent should fill up an application, he should be deemed to be the agent for that purpose of the insured and not of the company "but the company will be responsible for all *surveys* made by their agents personally."

Held, affirming the judgment of the Common Pleas, 26 C. P. 380, that the diagram was a survey within the meaning of the above proviso, and that the company, therefore, and not the plaintiff, were responsible for its inaccuracy.

The proofs of loss did not comply with the conditions of the policy sued on, but they were in accordance with printed forms furnished to the plaintiff by the defendants' agent. The company received them on the 6th of August, and on the 11th of November informed the plaintiff that they had placed the matter in the hands of the Gore District Insurance Company for adjustment "saving their rights at law"; but they took no objection to the sufficiency of the proofs until the trial. *Held*, that under the circumstances they were estopped from taking advantage of the defect.

Per BURTON, J.A., that the saving clause in defendants' letter referred to any objection to the claim itself and not to the preliminary proofs.

Per BURTON, J.A., that the fact that the agent had furnished the forms on which the proofs were made would not have bound the company, as he had no authority to supply forms for such a purpose.

The condition as to proof of loss required a certificate from the magistrate most contiguous to the place of fire: *Held*, that the condition was unjust and unreasonable, and therefore void, under sec. 33 of 36 Vic., ch. 44, O.

It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, which the jury found they had received, and that they had not within two weeks thereafter notified the insured of their dissent. *Held*, that the notice must be presumed to have reached the company, as there was no evidence of its non-receipt; and that under 36 Vic., ch. 44, sec. 38, O., they must be deemed to have assented to it, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course.

In re Imperial Land Co. of Marseilles, L. R. 7 Ch. App. 592, and *McCann v. Waterloo Ins. Co.*, 34 U. C. R. 381, distinguished.

This was an appeal from the judgment of the Common Pleas discharging a rule *nisi* to set aside the verdict for the

plaintiff, or for a new trial, reported 26 C. P. 380. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were :

1. The plaintiff has adopted the policy of insurance declared on, and the parties hereto are bound by its provisions, and the misrepresentations and concealments in the application and diagram void the said policy : *Bunyon* on Fire Insurance, 2nd ed., pp. 68, 70 ; *Mason v. Agricultural Mutual Assurance Association*, 18 C. P. 22.

2. The plaintiff relied upon Morris's personal guarantee, and put confidence in him personally—not as representing the defendants—that he would correct the distances ; and Morris had no authority to bind the company by any agreement, or waive any agreement or condition.

3. The agent, Morris, had no authority or power to make out applications or diagrams, as the application and policy stated ; and even if he had, it could not excuse the plaintiff for signing an application he knew to be incorrect, and which he knew misrepresented by erroneous statements and concealments the risk to be undertaken by the company ; he knew the application was wrong—the company believed it right : *Shannon v. Gore District Mutual Ins. Co.*, 37 U. C. R. 380.

4. The agreement that the plaintiff should furnish a certificate under the hand of the most contiguous magistrate is just and reasonable : *Bunyon* on Fire Insurance, 2nd ed. p. 102 ; *Lampkin v. Western Assurance Co.*, 13 U. C. R. 237.

5. The agreement or covenant relating to proofs of loss is in the body of the policy as an agreement between the parties, and is not a condition of the policy, and, therefore, sec. 33 of ch. 44, 36 Vic. O., is not applicable.

6. The Legislature of Ontario has no power to legislate in matters of insurance, and the Act 36 Vic., ch. 44, O., is therefore *ultra vires*.

7. There was no evidence to submit to the jury that the defendants "received" notice of further insurance in the

Citizens' Insurance Company ; the evidence that a letter of notice addressed to "The Hastings Mutual Fire Insurance Company, Belleville," and mailed at Barrie, not shewn to have been post-paid, not being any evidence of receipt : *McCann v. Waterloo Ins. Co.*, 34 U. C. R. 376.

8. The plaintiff, in his declaration, sets out the provisions and agreements of the policy, and alleges a compliance therewith, and nowhere upon the record is any waiver of performance set up ; and the evidence establishes the defendants' fourth, fifth, sixth, seventh, eighth, and tenth pleas, and their second, third, fourth, and fifth rejoinders, entitling them to a verdict.

9. The agent, Morris, had no authority to adjust losses ; the company furnished no blank forms for proof of loss, and Morris, by furnishing the blank of another company, could not waive the agreement as to proofs of loss ; such blank contained on its face notice that it was not the form of the defendants, and silence by the company as to defects therein is no waiver of such defects : *Mason v. Hartford Assurance Co.*, 37 U. C. R., 437.

10. The agent of the company made no survey of the premises within the meaning of the policy, and nothing that the agent did can relieve from the express covenants and warranties of the plaintiff.

The following were the respondent's reasons against appeal :—

1. There was no misrepresentation by the plaintiff, as alleged by the defendants, in their seventh and eighth pleas ; and the mistakes alleged in the diagram, and endorsed on the Application for insurance, were the mistakes of the defendants' agent, who made a survey of the insured premises personally, for which, by the terms and conditions contained in the Application and Policy, the defendants agreed to be responsible. The defendants, therefore, cannot set up the omission as to a building, nor the alleged erroneous statement as to the distance of another building from the insured premises, as a defence to the plaintiff's claim.

2. The evidence shews that Morris, as the appellants'

agent, first solicited the risk, and that the plaintiff treated with him as such agent, and in no other way, and the endeavour by the appellants to repudiate the acts of such agent, and the knowledge gained by him in the course of the taking of such risk, is an attempt on their part to assert in their interest a distinction in the law relating to principal and agent between the defendants as an Insurance Company and other principals, which is not founded on either reason or authority. Insurance Companies who necessarily carry on their business, to a large extent, through agents—some authorized to canvass and solicit risks, and to obtain applications, make surveys, effect interim insurances, &c., &c., cannot, in justice, be heard to say that the knowledge which their agents acquire in the course of their employment, and at least, within the scope of their agency, is not their knowledge. *Le Neve v. Le Neve*, 1 Ves. Sen. 64; *Penley v. Beacon Insurance Company*, 7 Gr. 130; *Tucker v. Provincial Insurance Company*, 7 Gr. 122; *Henry v. Agricultural Insurance Company*, 11 Gr. 125; *Wyld v. The London and Liverpool Insurance Company*, per Mr. Justice Wilson, 33 U. C. R. 284, 302, S. C. 21 Gr. 458, and in Appeal 23 Gr. 442; *Hopkins v. Provincial Insurance Company*, 18 C. P. 74; *New England Fire and Marine Insurance Company v. Schettler*, 38 Ill. 166; *Van Boires v. United Life Insurance Company*, 8 Bush, N. Y., 133; *Sexton v. Montgomery Insurance Company*, 9 Barb., N. Y., 191; and cases in *Shannon v. Gore Insurance Company*, 37 U. C. R., 380, 389, 90, 91, 94, 95, 97; *Wing v. Harvey*, 5 DeG. M. G., 265; *Montreal Assurance Company v. Gillivray*, 13 Moo. P. C. 87, 121 and 124; *Dresser v. Norwood*, 10 Jur. N. S., 851.

3. In any event the attempt to escape liabilities on the ground of the alleged misstatements and omissions in the diagram or application, known as they were in fact to the defendants' agent, could not avail the defendants in this case, where the defendants had agreed that they would be responsible when the survey was made, as in this case, by their agent.

4. The certificate of the magistrate furnished was sufficient. The objection that it was not taken before the magistrate "most contiguous" to the place of the fire, is founded on an unreasonable condition, which was found by the learned Judge before whom the case was tried to be a condition not just and reasonable, under authority vested in him by sec. 33 of 36 Vic., ch. 44, O. And as to the alleged non-compliance of the certificate in form with that required by the condition of the policy, the defendants having, as they did, through their agent, furnished the plaintiff, or his agent who prepared the claim papers, with the forms which he used, are estopped from setting up that the forms do not comply with exact conditions of the policy: See *McRossie v. Provincial Ins. Co.*, 34 U. C. R. 55

5. There was evidence of the sending of the notice of the insurance effected by the plaintiff in Citizens' Insurance Company, and of its receipt by the defendants, which should not have been withheld from the jury, and their finding that it was received was fully warranted: *Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. App. 587.

The case was argued on the 15th March, 1877 (a).

Bethune, Q. C. (with him *G. D. Dickson*), for the appellants.

McCarthy, Q. C. (with him *Strathy*), for the respondent.

The arguments fully appear in the reasons for and against the appeal.

The following additional cases were cited:—

For the appellants: *McMath v. Confederation Life Ass. Co.*, 36 U. C. R. 459; *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Mason v. Agricultural Mutual Ass. Co. of Canada*, 16 C. P. 493; *Redford v. Mutual Ins. Co. of Clinton*, 38 U. C. R. 541; *Worsley v. Wood*, 6 T. R. 710; *Kerr v. British America Ass. Co.*, 32 U. C. R. 569; *Butler v. Waterloo Mutual Ins. Co.*, 29 U. C. R. 553; *McFaul v. Montreal Mutual Ins. Co.*, 2 U. C. R. 59; *Smith v. Commercial Union Ins. Co.*, 33 U. C. R. 69; *Merritt v. Niagara Mutual Ins. Co.*, 18 U. C. R. 529; *Davis v. The Scottish Provincial*

(a) *Present*.—BURTON, J. A., HARRISON, C. J., MOSS, J. A., and BLAKE, V. C.

Ins. Co., 16 C. P. 189; *Kelly v. Isolated Risk Ins. Co.*, 26 C. P. 299; *Mason v. Andes Ins. Co.*, 23 C. P. 37; *Cooper v. Farmers' Mut. Ins. Co.*, 50 Penn. 304; *Denny v. Conway*, 13 Gray 492; *Rowe v. Lancashire Ins. Co.*, 12 Gr. 311; *Shannon v. Gore District Mutual Ins. Co.*, 37 U. C. R. 380; *McBride v. Gore District Mutual Ins. Co.*, 30 U. C. R. 457; *Fowler v. Scottish Equitable Ins. Co.*, 4 Jur. N. S. 1169; *Johnson v. Niagara District Mutual Ins. Co.*, 13 C. P. 331.

For the respondents: *Houghton v. Manufacturers' Ins. Co.*, 8 Met. 114; *In re Universal Non Tariff Fire Ins. Co.*, 19 Eq. 485; *Ionides v. Pacific Ins. Co.*, 6 Q. B. 674; *S. C.* 7 Q. B. 517; *Brown v. Blackwell*, 35 U. C. R. 239; *Williams v. Canada Farmers Mutual Ins. Co.*, 27 C. P. 119; *Parsons v. Bignold*, 15 L. J. Chy. 379; *May on Insurance*, 162, 170, 264.

September 15, 1877. (a) BURTON, J. A.—This action is on a policy of insurance granted by the defendants on the 13th of May, 1874, insuring the machinery in a grist mill for \$2,000, for one year from the 22nd of the previous month of April.

There were twelve pleas upon the record, but the only questions argued before us arose under the ninth, setting up that the plaintiff had, without obtaining the consent of the company by endorsement on the policy, effected another insurance; under the sixth plea, as to the proof of loss; and under the seventh, eighth, and eleventh pleas, which allege that the policy was avoided by reason of a misrepresentation as to the distance of the property insured from other buildings.

Issue is joined on the ninth plea.

To the seventh plea there is a replication that the insurance was effected through a local agent having authority to solicit risks, and to inspect premises, receive premiums, and effect interim insurances, and that the agent personally inspected the property insured, and made out the application, and the same was signed upon the under-

(a) *Present*.—BURTON, J. A., HARRISON, C. J., MOSS, J. A., and BLAKE, V. C.

taking of the agent that he would amend the same by inserting therein any building within 100 feet. That relying on such representation he completed the insurance and took an interim receipt, but the agent neglected to make the amendment, by inserting therein that there was a building within 100 feet, of which the plaintiff had no knowledge until after the loss, and there was no fraud or fraudulent misrepresentation on his part in reference to the said matter.

A similar replication to the eighth plea.

The defendants rejoin that the agent had no authority to make out applications: that the application was signed by the plaintiff, and handed to the local agent, he knowing that the local agent was not the proper officer to accept or reject, and that the risk was accepted by the defendants upon the representation in the application and diagram contained.

And, second rejoinder, that it was specially provided in the application that a special survey must be filled up by the applicant on all mill and factory risks: that such survey was made and filled up, and forwarded to the head office by the local agent to be approved by the proper officer of the company, and the plaintiff knowing that such officer would accept or reject the application upon the belief that the representation was true, and the defendants having no knowledge of the facts alleged in the replication, and believing the representation so made in the survey, accepted the same.

Upon the argument before us Mr. Bethune confined himself to two objections—the existence of another insurance undisclosed to the defendants, and the misrepresentation of the plaintiff in effecting the insurance as disclosed in the seventh and eighth pleas.

The counsel for the plaintiff urged, as to the first of these objections, that to work a forfeiture the evidence must be of the clearest kind, and that there was no legal evidence of the existence of such further insurance, and that certainly would appear to be so if the evidence is

correctly reported. From the way in which the case appears, however, to have been disposed of at the trial, it may be assumed that formal evidence of the policy was dispensed with, and it is too late now to raise the question, which is, I think, properly confined to whether there was any evidence that this additional insurance existed with the consent of the defendants; and this again must depend upon whether a letter mailed to the proper address of the defendants, which is proved to have been put into the post office, must not be presumed, from the known course of business in that department of the public service, to have reached its destination at the regular time, and have been received by the person to whom it was addressed.

That would appear to be correct in principle, and to be borne out by a number of decided cases, and I should have so decided without hesitation but for a doubt thrown upon it in the case of *McCann v. Waterloo Ins. Co.*, 34 U. C. R. 381.

The learned Judge, in delivering the judgment of the Court in that case, basing his decision upon the authority of a case in L. R. 6 Ex., *British and American Telegraph Co. v. Colson* 108, held that the posting of a letter was not *prima facie* evidence of the delivery of notice to the secretary of the company, to whom it was addressed.

It may be noted that in that case the letter was addressed to the secretary of the company at Waterloo merely, not adding the word "Ontario," and that there is a post office similarly designated in the Province of Quebec, and it was in evidence that there was another place named Waterloo, near Kingston, in this Province; and the case therefore might have been disposed of on the ground that the letter was insufficiently addressed, and the evidence consequently was not of a character to throw the onus on the other side of disproving its receipt.

The case, however, relied upon in 6 Exchequer was much discussed and disapproved of by the Lords Justices in Appeal, in the case of the *In Re Imperial Land Co. of Marseilles*, L. R. 7 Ch. App. 592, and decided at most that although

the posting of a letter in reply to another, if the letter arrives, may be a complete contract, yet if from any cause, such as a failure of duty by the post office, the letter never arrives at all, it would be otherwise. That case does not therefore affect the question before us here. It is no doubt open to the defendants to shew that by some accident the letter in fact was not received, but the posting raises a presumption of its due delivery, unless that presumption is removed by reason of there being no positive evidence of the prepayment of the letter as required by the 19th section of the Post Office Act of 1875, which renders prepayment of postage obligatory, and directs that in default such letter shall not be forwarded by post; but the evidence shews that at the time this letter was sent similar ones were posted to the Gore and the Citizens, and to these answers were received. I think, therefore, it cannot be said that there was no evidence for the jury, and as they have expressly found that the plaintiff did mail a notice addressed to the defendants at Belleville, and that that notice was received by the defendants, we should properly hold that the additional insurance was assented to by the defendants, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course.

Then as to the misrepresentation. In the seventh plea the allegation is, that if the plaintiff should in his application make any erroneous representation, or omit to make known any fact material to the risk, the policy should be void; and it alleges that in and by the application he erroneously represented that there was no building within a distance of 100 feet from the property insured, which representation was material to the risk.

The eighth plea, after stating that it was agreed that the application should form part of, and be read and construed as part and portion of the policy, and that if the plaintiff should omit to disclose or make known any fact material to the risk, then the policy should be void, alleges that the plaintiff by his application omitted to make known

the material fact that there was a building within 60 feet from the building containing the property, which rendered the risk a more hazardous one than the one disclosed by the application.

The plaintiff takes issue on these pleas, and also replies specially as above mentioned, to which I shall presently refer, but on the issue joined upon the pleas the learned Judge, among other questions which he submitted to the jury, asked whether the plaintiff did in his application erroneously represent that there was no building within 100 feet of the grist mill, which they answered in the negative, meaning, I assume, to say that the plaintiff personally had authorized no such representation, as the application signed by him did in point of fact contain such a representation, which was admitted to be erroneous.

But upon the special replication and rejoinder the question arises as to how far the circumstance that the application was prepared by the agent of the company will excuse the misstatement or suppression of a material fact, or preclude the company from relying on the error as a breach of the condition of the policy.

Morris, the agent of the company through whom the plaintiff effected the policy, was not, as is admitted and is shewn in evidence, the agent of the company to make contracts of insurance binding upon them, unless possibly during the interval between the date of the receipt of the premium, and the acceptance or rejection of the application by the board of directors. His duty was to receive and transmit the application to a board of directors as a basis upon which they could arrive at a decision whether to accept or reject it, receive the premium and deliver the policy if it should be granted.

The plaintiff knew that he was their agent, and he knew that his authority was limited in the manner I have indicated. If therefore under such a state of circumstances he chose to employ an agent of the company to do a duty which it was incumbent upon him to transact with care and deliberation (for the *uberrima fides* so constantly

referred to in insurance matters is as much required on the one side as the other), he cannot be relieved from the consequences resulting from any negligence or want of skill on the part of the agent he has thus selected. Adopting the language of the Chief Justice of the Supreme Court of Massachusetts: "It behooves the assured to see for himself, or get some skilful or trustworthy agent to act for him, and not to sign any paper which is not in fact substantially true, when his important rights—in fact all the benefits of the contract—are dependent on it."

It is frequently stated in the application that the agent, if so employed, will be regarded as the agent of the applicant, but such a statement, though very proper with a view to prevent the possibility of misapprehension, is in a legal sense unnecessary, if in point of fact the agent of the company has only a limited authority to receive and transmit the application; and if the extent of his authority had stopped there I should have little hesitation in holding that the defendants were not affected by the act of their agent; but in the present case the agent's authority was in one respect more extensive. In the policy, though not in the application, is a statement that if an agent of the company fills up an application then such agent shall be considered as acting for the applicant, and not for the company, and then adds: "*But the company will be responsible for all surveys made by their agent personally.*"

It is sworn by the plaintiff, and he is in that respect supported by two other witnesses, that when the application was read over to him he remarked that the measurements were not correct, and the agent then assured him that he would ascertain and correct them before sending it off, and the jury have so found. When therefore he sent off the application without making the promised corrections he was doing something which he had no authority from the plaintiff to do.

He was the agent of the defendants, not only to transmit the application, but he had authority to make surveys, and having in his character of agent for the company under-

taken to do that, and having omitted to do it, but on the contrary, having without the authority of the plaintiff sent off this erroneous application, he committed an error in the performance of a duty for which the company solely had employed him, and they must bear the consequences, and are equitably estopped from urging such an objection to the plaintiff's recovery.

Mr. Dickson, in addition, raised some further objections, which it is said were abandoned in the Court below, as to the sufficiency of the proofs.

I must admit that I am not impressed by the circumstance that the local agent furnished the forms on which the proofs were made. It was evidently an unauthorized act on his part, it being in evidence that the company did not furnish forms to their agents for such a purpose, and it would, in my opinion, be a violation of all the rules regulating the relations and responsibilities of principal and agent to hold the company bound by such an act; but I think it was the duty of the company, certainly morally if not legally, on discovering the fact that they were not in accordance with the exact requirements of their conditions, bearing in mind the fact that this policy was not delivered till after the fire, to call their attention to it, and it required but very slight evidence to warrant a jury in concluding that any objection to the strict form of these proofs was waived. The proofs were received on or about the 6th of August. On the 11th of November, the company, not raising then, or previously, any question as to the sufficiency of these proofs, write that they have placed the matter in the hands of the Gore District for adjustment, saving their rights at law. This saving must, I think, be held to refer to any objection to the claim itself, and not to the sufficiency or insufficiency of the preliminary proofs; and having left the matter in that position, they are estopped from falling back upon any technical objection to these proofs.

The question as to the certificate of the "most contiguous" magistrate was, I thought, disposed of on the argument,

but upon that point I entirely concur in the conclusion of the learned Chief Justice of the Queen's Bench, whose judgment I have had an opportunity of reading.

I am of opinion that the appeal should be dismissed, with costs.

HARRISON, C. J. — The first question is, as to the meaning of the condition as to the magistrate's certificate.

The condition, as set out in the declaration, is, that the plaintiff "should furnish a certificate under the hand of the magistrate or notary public most contiguous to the place of fire, and not concerned in the loss, &c."

This is the condition to be found in the body of the second policy delivered by the defendants to the plaintiff. Such a condition is certainly precedent to the plaintiff's right of recovery: *Routledge v. Burrell*, 1 H. Bl. 254; *Wood et al. v. Worsley*, 2 H. Bl. 574, S. C., 6 T. R. 710; *Langdell v. Mutual Ins. Co. of Prescott*, 17 U. C. R. 524; *Kerr v. British America Ins. Co.*, 32 U. C. R. 569. It is sometimes in the form requiring the certificate of "the nearest magistrate," or "magistrate most contiguous": *Cornell et ux. v. The Hope Ins. Co.*, 3 Martin N. S. 223, S. C., 1 Bennett 141; *Leadbetter v. The Ætna Ins. Co.*, 13 Maine 265, S. C., 1 Benn. 539.

Whether the condition require the certificate of "the nearest magistrate," or of the "magistrate most contiguous," full compliance is needed: *Lampkin v. The Western Ass. Co.*, 13 U. C. R. 237. The condition does not mean a certificate from any magistrate, but of the magistrate who is nearest or most contiguous to the place of the fire: *Protection Ins. Co. v. Pherson*, 5, Port Ind. 417, S. C., 3 Benn. 753. Slight proof, however that the magistrate who signed the certificate is the nearest or most contiguous magistrate is *prima facie* sufficient: *Cornell v. LeRoy et al.*, 9 Wendell 163, S. C., 1 Benn. 408. The Court will not permit a nice calculation, touching a discrepancy of a few feet, to defeat the plaintiff's demand: *Turley v. North America Ins. Co.*, 25 Wend. N. Y. 374;

Peoria Mutual Fire Ins. Co. v. Whitehill, 25 Ill. 466, S. C., 4 Bennett 546. But where the distance between the magistrates is a mile or more, it is impossible for the Court wholly to disregard the precise and positive language of the contract: *Moody v. The Aetna Ins. Co.*, 2 Thompson Nova Scotia Rep. 173, S. C. 2 Benn. 166.

The magistrate who signed the certificate for the plaintiff in this case was living about three miles from the place of the fire. Two magistrates lived within half a mile; a third magistrate lived not more than two miles away. The reason that the plaintiff did not get either of the two magistrates who lived nearest the place of the fire was, as he swore, because one was drunk all the time, and the other had some enmity against him. The contract makes no exceptions. Even the refusal, without excuse, of the nearest magistrate to sign the certificate would not dispense with the performance of the condition precedent: *Worsley v. Wood*, 6 T. R. 710. See further *Oldman v. Bewicke et al.*, 2 H. Bl. 577, note.

It is clear on the authorities that the plaintiff has not complied with the condition precedent.

The next question is, whether the condition, as expressed, is "just and reasonable," within the meaning of section 33 of 36 Vic. ch. 44, O.

If we should be of opinion in the negative, we have power under that section to declare our opinion, and in that event the condition becomes "absolutely null and void."

The purpose of such a condition is security against fraudulent conduct on the part of the assured. Insurance companies are liable to frauds and impositions. Common prudence, therefore, suggests to them the propriety of taking all possible care to protect themselves from frauds when they make these contracts. But whether the certificate be signed by the nearest magistrate, or in good faith by a magistrate in the vicinity of the place of the fire, there would, I apprehend, be ample protection so far as the object of the condition is concerned.

The condition in the policy first issued to the plaintiff required the plaintiff "to procure a certificate under the hand and seal of a magistrate contiguous to the place of the fire," &c. This is reasonable. More than this may be unreasonable. To require that the certificate shall be that of *the* magistrate most contiguous to the place of the fire, without exception of any kind, is unreasonable; and where the condition is without necessity so unreasonable as to permit an insurance company, if so disposed, to take advantage of it to defeat an honest demand, it is not too much to hold that the condition is unjust.

We are not without some guide in the consideration of this condition. The Legislature of Ontario, in 1876, provided by Act of Parliament for the appointment of a commission "for the purpose of determining what conditions of a fire insurance policy are just and reasonable conditions": 38 Vic. ch. 65, sec. 2. A commission was appointed, and a majority of the commissioners settled and approved of the conditions set forth in the schedule to 39 Vic. ch. 24, O. Condition 12 E of the schedule is as follows:—"He is to produce if required a certificate under the hand of a magistrate, notary public, or clergyman, residing *in the vicinity* in which the fire happened," &c. This expresses what the Legislature has declared to be a reasonable condition.

In *Morrow v. The Waterloo Mutual Fire Ins. Co.*, 39 U. C. R. 441, the insured was unable, owing to the suspicion of arson, to procure any certificate from any magistrate in the vicinity of the fire. He was obliged to go into an adjoining county, 14 or 15 miles from the scene of the fire, to procure a certificate. Such conduct would not be a compliance with the condition whether strictly or broadly construed. It was opposed to the very object and purpose of such a condition, however expressed. The attention of the Court was apparently not drawn critically to the precise language of the condition. Had the insured procured a certificate from a magistrate living not only in the same county as the fire, but in the vicinity of the fire, although

not the nearest magistrate, the question which we have now before us would have been necessarily raised. Having been counsel for the insured in some earlier proceedings, I took no part in the judgment of the Court. But the facts of that case and this are so widely different that I do not hesitate in my decision by reason of anything said in that case. The Court is bound to look at the particular matter in each case to see whether the condition is reasonable and just. See per Jervis, C. J., in *London and North-Western R. W. Co. v. Dunham*, 18 C. B. 830. See further *Harrison v. London, Brighton, and S. C. R. W. Co.*, 2 B. & S. 122.

To permit the insurance company in this case, without any ground for imputing bad faith to the plaintiff, to defeat the plaintiff's suit because he did not furnish a certificate from the nearest magistrate, when he in good faith furnished a certificate from a near magistrate, would, I think, be to allow the company to avail themselves of a provision of the contract which must be held to be not only unjust, but unreasonable.

As I am of opinion that the condition is unjust and unreasonable, and therefore absolutely void, it is unnecessary to consider either whether the certificate is sufficient in form, or the company is estopped from setting up its insufficiency in form. I must read the policy as if no such condition were a part of it. It is not for the Court to amend conditions. Either they are good or bad, valid or invalid. I am of opinion that this is invalid, and therefore the same as if it had never been inserted in the policy.

It is further contended by the defendants that there was no notice in writing received by them of the additional insurance effected by the plaintiff. He swears he mailed to the defendants a notice in writing, properly addressed. They are unable to produce the papers bearing on the claim. They do not swear that no such notice was received. The jury have found not only that the notice was mailed by the plaintiff, but received by the defendants. The only question on this finding is, whether there was evidence of the receipt of the notice by the defendants.

Where a letter is proved to have been correctly addressed, mailed, and not returned, it is presumed to have reached its destination: *Warren v. Warren*, 1 C. M. & R. 250. Parke, B., said: "If a letter is sent by the post it is *prima facie* proof, until the contrary be proved, that the party to whom it is addressed received it in due course." It is a presumption of fact. It has been adopted by the English Legislature in the 63rd section of the Companies Act of 1862. It is sanctioned, as regards the cancellation of policies of insurance, by section 26 of 36 Vic. ch. 44, Ont. It is adopted by the Ontario Legislature in the case of notice of protest of bills or notes, (Consol. Stat. ch. 42, sec. 16.)

The presumption is so strong that the sender is not to be held responsible for the delays of the postal authorities: *Stocken v. Collier*, 7 M. & W. 515; *Duncan v. Topham*, 8 C. B. 225; *Potter v. Sanders*, 6 Hare 1; *Wilson v. Pringle*, 14 U. C. R. 230; *Taylor v. Greer*, 17 U. C. R. 222; *Papillon v. Brunton*, 5 H. & N. 518, 521.

It has been held that a contract to buy goods is complete when the letter of acceptance properly addressed is mailed: *Adams et al. v. Lindsell*, 1 B. & Al. 681; *Dunlop v. Higgins*, 1 H. L. C. 381. The principal authority against this position is, *British American Telegraph Co. v. Colson*, L. R. 6 Ex. 108. But although that case was referred to with approval in *McCann v. The Waterloo Mutual Insurance Co.*, 34 U. C. R. 376, 381, it is not consistent with the decision of the House of Lords in *Dunlop v. Higgins*, 1 H. L. C. 381, and is opposed to several other cases, see *Townsend's Case*, L. R. 13 Eq. 148; *Harris's Case*, L. R. 7 Ch. 587; *Walls's Case*, L. R. 15 Eq. 18.

Besides, in *McCann v. The Waterloo County Ins. Co.*, 34 U. C. R. 376, there was evidence that the letter had not been properly addressed, and had not in truth reached its destination. That case is therefore distinguishable from the present. In *Lyons v. The Manufacturers and Merchants' Ins. Co.*, 28 C. P. 13, there was abundant evidence on the part of the defendants that there was no such notice received by the defendants. Here there is no satisfactory

evidence of that description. In the absence of evidence of some kind to rebut the presumption of receipt from the fact of mailing of a letter properly addressed, and I assume properly stamped, no fault can, in my opinion, be found with the jury for finding that the letter so mailed had been received by the defendants.

This reduces the enquiry to the question whether there was such a misrepresentation on the part of the assured as to avoid the policy.

The misrepresentations alleged are, the saw-mill was distant from the grist-mill 140 feet, and that the nearest building was distant 100 feet, and that that there was no building nearer than 100 feet to the grist-mill. These are not to be found in the application proper, but only on reference to the survey or diagram of the survey endorsed on the application.

Now this diagram was, according to the preponderance of the evidence, prepared by the agent of the company after a personal survey of the risk. His attention was drawn by the plaintiff to the fact that the diagram was not correct. The agent promised to measure the distances and to make the necessary alterations. The defendants assert that he omitted to do so, and that they were therefore misled by the application, survey, and diagram. They now maintain that if the truth as to adjacent buildings had been represented to them they either would not have taken the risk at all, or if at all, only at a higher premium than paid by the plaintiff. The plaintiff, on the faith that the agent would make the necessary alterations, paid the premium money, and did not know but that the agent had done as promised till after the fire. The company notwithstanding, on this ground, endeavour to escape payment of the insurance money.

If the application for insurance, whether embracing the survey, which in general is but a plan or description of the premises shewing with more or less completeness its condition and surroundings, contains merely the data upon which the real contract is based, the data are

not to be held as warranties unless the policy embodies them and makes them parts of the contract: *Denny v. Conway Stock and Mutual Ins. Co.*, 13 Gray 492; *Kentucky and Louisville Ins. Co. v. Southard*, 8 B. Mon. 634; *Columbia Ins. Co. v. Cooper*, 50 Penn. 431. A reference in general terms from the policy to the application, survey, or diagram, is not sufficient for that purpose: *Glendale Woollen Co. v. Protection Ins. Co.*, 21 Conn. 19; S. C., 3 Benn. 213; *Sheldon v. Hartford Ins. Co.*, 22 Conn. 235.

The agent of the company, although declared by the policy to be the agent of the assured for the purposes of making the application, may nevertheless be held to be also the agent of the company: *Masters v. Madison County Mutual Ins. Co.*, 11 Barb. 624; S. C., 3 Benn. 398, 400. Chippen, J., in speaking of such a clause in a policy, said: "I have always regarded this clause in the by-laws of these companies as a device resorted to by them for the purpose of shunning just responsibility." But the Court must be careful not to allow their sense of an attempted injustice to blind them to the actual words of the contract. See *Sexton et al. v. The Montgomery County Mutual Ins. Co.*, 9 Barb. 191; S. C., 3 Benn. 90. So where the policy provides "that the company will be responsible for surveys made by its agents," effect must be given to the language too plain to be mistaken, and so just as not to be overlooked: *May et al. The Buckeye Mutual Ins. Co.*, 25 Wis. 291; S. C., 3 Benn. 554.

The word "survey" as used in a policy of insurance may import only a diagram, or inspection and diagram: *Denny v. The Conway Ins. Co.*, 13 Gray 492; or may in reference to the context be so construed as to embrace the whole application for insurance, when the latter is prepared by the agent of the company: *Glendale Manufacturing Co. v. The Protection Ins. Co.*, 21 Conn. 19; *May et al. v. The Buckeye Mutual Ins. Co.*, 25 Wis. 291, S. C., 3 Benn. 554.

The policy here speaks severally of "the application,"

“survey,” and “diagram.” The words are, “that the application of the assured, upon which the insurance is granted, the survey and diagram of the premises, and all things therein contained, shall be taken and considered as a part and portion of the policy.” And while this is so the avoiding clause is as follows: “That if the assured *in the application* referred to herein make any erroneous representation, or omit to make known any fact material to the risk * * then and in every such case this policy shall be void.” The policy therefore is not in words made void for a misrepresentation in the survey or diagram endorsed on the application.

It may be that the words “survey or diagram” used in the first part of the policy were designedly omitted from the part just quoted; and this hypothesis is supported by the last clause in the policy, which is to the effect that “the company will be responsible for all surveys made by their agents personally.”

While the policy contains the general clause, “And if an agent of this company fill up an application for insurance therein such agent shall be considered as acting for the applicant, and not for the company,” the responsibility of the company for surveys made by its agents personally is a declared exception thereto.

If an insurance company desire by their policy to have the unjust privilege of defeating their contract by reason of the neglect of their own agent in making the survey or diagram, they must, I think, in the absence of fraud and collusion, use language more free from doubt than the language used in this policy.

The rule, in the absence of an express provision to the contrary contained in the policy, is, that an insurance company is responsible for personal surveys made by their agents, and is bound to know whatever he learns or ought to learn when making the survey: *In re Universal Non-Tariff Ins. Co.*, L. R. 19 Eq. 485; *Moliere v. The Pennsylvania Fire Ins. Co.*, 5 Rawle 342; *Pimm v. Lewis*, 2 F. & F. 778.

The rule is eminently a good and a just one, and for that reason, I presume, has found a place in this policy, and I cannot imagine a better case for its application than the case now before us.

In my opinion the appeal should be dismissed, with costs.

BLAKE, V. C.—In answer to the question put to the jury, “Did the plaintiff mail a notice addressed to the defendants at Belleville of his insurance in the Citizens’ Company, and was that notice received by the defendants”? they answered “yes.” I think the evidence warrants this conclusion, and, as the company did not dissent, it must be taken that after due notice this insurance was allowed.

In answer to the further question, “Were there any untrue statements in the application and diagram on which the policy in question was issued, besides those mentioned above; and if so, what were they”? the jury answered “no.” The policy contains the clause that “the company will be responsible for all surveys made by their agents personally.” In this case the agent personally surveyed the premises, and undertook truly to represent them to the company.

I think the jury were justified in their conclusion that the representation as to the distances was one made by the agent, and that under the circumstances the plaintiff was not responsible for its inaccuracy, and therefore could not be said to have made a misrepresentation in connection with this fact.

Looking at the manner in which the forms, called the “claim papers,” came into the hands of the plaintiff, and at the action of the company subsequent to the receiving by them of the proofs of loss, I do not think we can listen to the objections now taken as to them.

I think the appeal should be dismissed with costs.

Moss, J. A., concurred.

Appeal dismissed.

MOLSON'S BANK V. McDONALD.

Promissory note—Discharge of indorser by giving time—Mortgage—Merger—Collateral security.

The plaintiffs took a mortgage from one M. to secure the payment of certain promissory notes made by him and endorsed to them by the defendant. The mortgage was subject to a proviso to be void on payment of \$4,300 with interest in one year, "the said sum of \$4,300 being represented by certain promissory notes now under discount, and held by the said mortgagees, and any renewals or substitutions theretofore that may hereafter be given for the same. All to be paid within one year from this date."

Held, affirming the judgment of the Queen's Bench, 40 U. C. R. 529, that there was no merger, and the mortgage was merely collateral security, and did not suspend any right of action on the notes.

THIS was an appeal from the judgment of the Court of Queen's Bench discharging a rule *nisi* to set aside the verdict for the plaintiffs, and to enter a verdict for the defendant, reported 40 Q. B. 529. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal,

The appellant's reasons of appeal were:—

1. That the defendant endorsed the notes merely as a surety for the maker, D. Mitchell McDonald, who was the principal debtor to the plaintiffs.

2. That the evidence adduced shews that the plaintiffs, by a binding contract made between them and the principal debtor, agreed to extend the time for payment of the debt in question for one year from the 26th of April, 1875, and that such agreement was made behind the back of the surety and without his knowledge or consent, whereby the surety became discharged: *Rees v. Berrington*, 3 W. & T. 814, 2 Ves. 540; *Samuell v. Howarth*, 3 Mer. 272, 278; *Calvert v. London Dock Co.*, 2 Keen 638; *Steam Navigation Co. v. Rolt*, 6 C. B. N. S. 550; *Moss v. Hall*, 5 Ex. 46; *Pooley v. Harradine*, 7 E. & B. 431; *Howell v. Jones*, 1 C. M. & R. 97; *Combe v. Woolf*, 8 Bing. 156; *Bailey v. Edwards*, 4 B. & S. 761.

3. That the notes sued on were endorsed by the surety merely as renewals of the notes which constituted the

original debt, and were so endorsed by him in ignorance of the said agreement to give time, and of his liability in respect of said debt: *Bell v. Gardiner*, 4 M. & G. 11; *Mills v. Alderberry*, 3 Ex. 590.

4. The mortgage deed made by the said principal debtor to the Molson's Bank, dated 26th April, A. D. 1875, contains proof of the said contract to give time; and parol evidence was inadmissible, and ought not to have been received in denial of said contract: *Lewis v. Jones*, 4 B. & C. 506, 511; *Ex parte Glendinning*, Buck 517; *Boulthbee v. Stubbs*, 18 Ves. 20; *Bailey v. Edwards*, 4 B. & S. 761; *Holmes v. Mathews*, 5 Gr. 35 (in Appeal); *Young v. Austen*, L. R. 4 C. P. 553; *Abrey v. Crux*, L. R. 5 C. P. 37; *Wallis v. Littell*, 11 C. B. N. S. 369; *Lindley v. Lacey*, 17 C. B. N. S. 578.

5. That if parol evidence was admissible on the question of the agreement to give time, such evidence preponderates in favour of the defendant, and establishes the agreement to give time.

6. That the evidence shews a dealing between the creditor and the principal debtor behind the back of the surety by which the latter is discharged: *Bamford v. Iles*, 3 Ex. 380; *Strange v. Fooks*, 4 Giff. 408; *Bonser v. Cox*, 4 Beav. 379, 6 Beav. 110; *Bonar v. McDonald*, 3 H. L. 226; *Pybus v. Gibb*, 6 E. & B. 902; *Blest v. Brown*, 8 Jur. N. S. 603.

7. That the plaintiffs took from the principal debtor security on his lands for the said debt, namely, the mortgage of the 26th April, 1875, which it was their duty to preserve and protect, which duty they omitted to perform; they allowed the said security to be destroyed, and allowed a prior mortgage on the same lands to be foreclosed without the knowledge or consent of the surety: *Mutual Loan Association v. Sudlow*, 5 C. B. N. S. 449; *Pearl v. Deacon*, 24 Beav. 186, 1 D. & J. 462; *Lake v. Brutton*, 8 D. M. & G. 452; *Watts v. Shuttleworth*, 5 H. & N. 235, 7 H. & N. 353; *Strange v. Fooks*, 4 Giff. 408; *Mahew v. Crickett*, 2 Swanst. 191.

8. The evidence is sufficient to entitle the defendant to a

reference or enquiry as to the value of the said mortgage security; and the Court below erred in refusing to direct or permit such reference, and allow the plea to be added, as mentioned in the rule *nisi* herein.

9. That the defendant may be permitted to give further evidence, by way of affidavit or otherwise, touching the value of said lands, and in disproof of the alleged agency of D. Mitchell McDonald.

10. In any case this action was brought too soon, and the defendant, if liable, could not properly be sued until the expiration of one year from the 26th of April, 1875.

11. D. Mitchell McDonald did not act as agent for the surety in giving the notes to the bank.

The respondents' reasons against the appeal were:

1. The judgment of the Court of Queen's Bench is right, and the appeal should be dismissed, for the reasons given in the judgment.

2. The evidence shews that the mortgage was intended to be and was executed and accepted as collateral security only for the notes, and there was no time given for the payment of the notes, as alleged in defendant's pleas, either upon the face of the mortgage or otherwise.

3. The acts on which the appellant relies as discharging his liability were done with the knowledge of the appellant's agent, duly authorized to act for him and entrusted by him with his endorsements.

4. The evidence shewed that there was no negligence or laches on the respondents' part in dealing with the said mortgage or the property therein contained; and the amendment asked for was rightly refused.

5. The respondents will rely on the authorities cited in the judgment of the Court of Queen's Bench.

The case was argued on the 20th June, 1877 (a).

T. Spencer and *C. Moss*, for the appellant.

(a) *Present*. — HAGARTY, C. J. C. P., BURTON and MOSS, JJ. A., PROUDFOOT, V.C.

C. Robinson, Q. C. (*R. Harris* with him), for the respondents.

The arguments sufficiently appear in the reasons for and against the appeal.

The following additional authorities were referred to. For the appellant:—*Ross v. Winans*, 5 C. P., 191; *Gould v. Robson*, 8 East 576; *Price v. Moulton*, 10 C. B., 573; *Greenough v. McLelland*, 2 L. T. N. S. 571; *Mason v. Scott*, 22 Gr. 612; *Matthewson v. Brouse*, 1 U. C. R. 275; *McAlpine v. How*, 9 Gr. 372; *DeColyar on Guarantees*, 26–7, 318. For the respondents:—*Walter v. Dexter*, 34 U. C. R. 426; *Bank of British North America v. Sherwood*, 6 U. C. R. 552; *McInnes v. Milton*, 30 U. C. R., 489; *DeColyar on Guarantees*, 323–5.

September 15, 1877 (*a*). HAGARTY, C. J. C. P.—I am of opinion that on the face of the mortgage it sufficiently appears that the giving of this security did not relieve the parties to any current or renewal paper from meeting that paper according to its terms: that it is in effect a mere collateral security, not enforceable in itself for a year; and that if the paper continued to be renewed over a year, the action on the mortgage would be controlled and suspended so long as paper representing the mortgage debt was current.

I do not care to go outside the language of the mortgage. It is to secure a named debt, and it declares that such a debt “is represented by certain notes then under discount, held by the mortgagees, and any renewals or substitutions therefor that might thereafter be given for the same.”

To my mind the mortgage emphatically disclaims any intention to interfere with the current paper, or any renewals thereof.

The contracts evidenced by the notes or renewals are the substantial existing bargains between the parties.

One of the parties—the principal debtor—pledges certain property to the bank to secure, or help to secure, that debt,

(*a*) *Present*.—HAGARTY, C. J. C. P., BURTON and MOSS, J. J. A., and PROUDFOOT, V. C.

and, as to such property and security, covenants to pay in a year with interest. No proceeding could be taken on the mortgage security earlier than such period. But the notes and renewals referred to are not, in my judgment affected thereby.

The whole point made for the appellant must be that the creditors had tied their hands as to proceeding against the principal debtor. To this the answer seems to me complete on the face of the mortgage: "You are answerable to us on paper shewn to be at (say) three months. We may, if we please, renew that paper for another three months; and, again, for a further period. Your liability on present or renewed paper remains just as it may appear on such paper—neither deferred or accelerated. We take this mortgage wholly beside such current or renewal contract, on the paper."

I cannot understand how paper given in renewal, made by the mortgagor and endorsed by the appellant, with or without notice of the mortgage, can be interfered with or affected.

Merger seems to me to be out of the question. When the instrument payable in a year specially refers to paper at shorter dates representing the same debt, and contemplating a fresh contract at shorter dates, or within the year, I cannot see how the contract apparent on the paper, current or renewed, can be held to have been or to be merged or extinguished in the specialty. If the simple contract debt was merged, the renewal note, both as against maker and endorser, would be idle and without consideration. The endorsee's defence must then rest wholly on the assumption that the creditors have tied their hands as against the maker.

I think the mortgage specially contradicts any such assumption, and provides sufficiently for the full upholding of the existing or any renewed contracts on promissory notes.

We must not, except on very clear evidence, favour any suggestions of merger; and while we must, in the present

state of the law, give effect to the doctrine of discharging the surety by the creditor "tying his hands" as against the principal, we must be sure that the facts shew beyond doubt that the creditor has done so.

I refer on this head to some very pointed remarks of Sir A. Cockburn in a late case of *Swire v. Redman*, L. R. 1 Q. B. Div. 536.

BURTON, J. A.—It is a general rule of law that a party, by taking a security of a higher nature in legal operation than the one he already holds, merges or extinguishes his legal remedies upon the pre-existing minor security or cause of action, unless there is something in the *instrument itself* to shew that it was intended only as a *further security*, and that the remedy on the pre-existing contract was to remain.

In this case the bank held certain notes made by Mitchell McDonald, the son of the defendant, who had endorsed them for his accommodation, and also certain other notes of Mitchell McDonald, unsecured by any endorser; and upon their pressing him for payment of a portion of the paper, he proposed to secure the whole by mortgage, the bank consenting, as he says, to give him, in that event, a year for payment. This is, however, denied by the bank managers; and the solicitor swears to an admission by Mitchell McDonald that no time was to be given although the mortgage was to extend over a year, to enable him in the meantime to pay it, it being contemplated that the paper should be renewed and paid off at the close of navigation. It resulted in the mortgage being given, which was in evidence at the trial, which contains no recital of the agreement, and no reference to endorsers, but purports to be made in consideration of \$4,300, and is subject to a proviso to be void on payment of that sum, with interest at eight per cent., in one year from date; and then adds, "the said sum being represented by certain promissory notes now under discount and held by the mortgagees, and any renewals or substitutions therefor that may hereafter

be given for the same, all to be paid within one year." Then follows a covenant to pay—not according to the tenor and effect of the notes, or such renewals as might be granted, but "to pay the mortgage money and interest and observe the above proviso."

The difficulty which I felt upon the argument, and which, I must confess, further consideration failed for a long time to remove, arose from the wording of this covenant, and the case is in this respect distinguishable from several of those which are referred to in the judgment of the Court below.

The question is, what was the legal effect or consequence of taking such a mortgage? I fully concede that if it can be made out from the instrument that the mortgage is collateral the defence must fail, because although where a debtor gives notes at short dates, all within a year, and afterwards gives a covenant to pay the same debt in a year, the remedy on the notes is merged in the higher security, yet where it is apparent that the remedy on the other security is reserved, the rule of law apparently would not apply on the principle, I suppose, that "*modus et conventio vincunt legem*," the Court merely giving effect to the intention of the parties, as they have themselves expressed it; although it has been questioned on very high authority, whether in any case where a specialty has been given by a sole debtor the legal effect of such specialty, as a merger of the simple contract debt, can be controlled or defeated by the agreement of the parties.

"I have no difficulty," says the learned Chancellor, Lord Truro, in the case to which I refer, *Owen v. Homan*, 3 McN. & G. 408, "in understanding that where a security is taken from a third party, and it is a question of intention whether such specialty was taken in satisfaction of the debt or as additional and collateral security, it is competent for the parties by agreement to state the true character of the transaction; but such a case stands quite independent of the principle, because in such a case there was no simple contract debt due from the third party, the remedy upon which

could merge in the specialty ; nor any specialty accepted from the original debtor to give a higher remedy to the creditor. * * If the simple contract remain, I see no reason why the creditor might not sue upon both, which I think would not be consistent with the general principles of law."

In this case the debtor, Mitchell McDonald, the maker of the promissory notes, entered into a covenant to pay at the expiration of a year a sum of money, at present, he says, represented by certain promissory notes ; and if this statement had stopped there, I should say there could be no question that the legal effect and operation of that covenant would be to alter the simple contract debt represented by the notes into a specialty debt. That of course in itself would not affect the liability of the endorser, but would merely merge or extinguish the remedy upon the note as against the maker. But the defendant contends that the effect of the covenant is to extend the time for payment, and therefore suspend any right of action on the notes until the expiration of the year, thereby discharging the defendant from liability on the original notes, in renewal of which the notes now sued on were endorsed without any notice of such discharge.

But this brings us back to the question of whether the mortgage operated as a merger of the remedy on the simple contract, or was collateral to it. If the latter, it follows that it is beside the notes which remain as the first security.

One of the learned counsel for the appellants conceded that he did not contend that the notes were merged in the ordinary sense of that term, but that there was a suspension of the remedy on the notes for a year. But I am unable to follow that argument.

To my mind, if it is conceded that the mortgage is merely collateral the defence fails ; and it is necessary therefore to consider whether the words which follow those which I have just quoted do indicate such an intention, and take this case out of the general rule that where a security of a higher nature is taken for the same debt, it operates as a merger of the lesser security.

Do, then, the words which follow, "and any renewals or substitutions therefor that may be hereafter given for the same," sufficiently indicate that it was given as a collateral security.

The learned Judge who pronounced the decision in the Court below does not discuss the legal effect of the covenant beyond a simple expression of concurrence in the view taken by the Judge at the trial, that the mortgage contained no implied contract that time should be extended.

In the case referred to by him of the *Bank of Upper Canada v. Sherwood*, 8 U. C. R. 118, it did not appear whether the mortgage did or did not extinguish the first notes; for all that appears, it contained no covenant and gave no right of action whatever, and therefore could not operate as a merger; and it was not distinctly alleged that the notes sued on were renewals of the notes in respect of which the mortgage was given.

In *Gore Bank v. Eaton*, 27 U. C. R. 335, the mortgage disclosed upon its face that it was taken as further security for payment, and was to be void on payment of the bills or any renewals of them.

In *Shaw v. Crawford*, 16 U. C. R. 103, which was an action against the endorser, the plaintiff had accepted a mortgage with an extension of time from the maker, but it contained a clause to the effect that it had been expressly agreed that it should operate and take effect as a collateral security only.

Bell v. Banks, 3 M. & G. 266, decides nothing more than that a mere forbearance by the creditor does not discharge the surety.

None of these cases furnish much assistance in the construction of the present mortgage. Granting that it can be treated as a collateral security, there is little difficulty in arriving at a decision; but whether it can be so treated is the question.

It is to be regretted that more care had not been taken by the parties definitely to set forth their agreement, and to reserve in express terms their remedies against the

surety ; but in the absence of such explicit language, we must endeavour to place a construction upon the words which have been used, and it may not be unimportant in this connection to refer to the acts of the parties themselves as indicating their own views, at the time of the execution of the mortgage, of the construction they themselves placed upon that instrument.

Mitchell McDonald, in expectation of further renewals of the note, was furnished by the defendant with blank endorsements to be used for that purpose, and that the son supposed that the mortgage was not to interfere with that course of dealing is to be found in the fact that the notes now sued on were discounted in renewal, notwithstanding the giving the mortgage. It may be quite true that the defendant might not be bound if the effect of the mortgage was different from what, upon much consideration, I assume it to be. But I think that to give the words "any renewals," &c., any sensible meaning, we must hold that, as the mortgage was to stand as security not only for the notes then current, but for those not then in existence, as to which there could be no merger or extinguishment, it must be regarded as a collateral security ; as in *Norfolk R. W. Co. v. McNamara*, 3 Ex. 628, where the bond was given to secure money already due as well as money to become due. Parke, B., there says : If this had been the case of a bond or covenant for the identical debt, the plea would have been a good answer ; but being given both for a present and a future debt, it was evident that it must have been meant only as collateral security.

The proper effect, I think, to give to these words is to hold that it was the intention of the parties to the mortgage that it should operate merely as a collateral or additional security to the notes, which were still to remain the primary security ; and whilst the bank were willing to hold their hands till the maturity of the mortgage, they did not desire to interfere with the right of the endorser who was left free to enforce his rights against the maker, if he thought fit to do so.

In this view it becomes unnecessary to consider the other questions, as I have come to the conclusion that upon the construction of the instrument the plea is not sustained.

I concur, therefore, that the appeal should be dismissed, with costs.

MOSS, J. A., and PROUDFOOT, V. C., concurred.

Appeal dismissed.

LE BANQUE NATIONALE V. SPARKS.

Promissory note—Endorsement in blank—Stamps—Date—31 Vic. ch. 9, sec. 4, D.—37 Vic. ch. 47, sec. 2, D.

Defendant endorsed a promissory note, blank as to the amount, and without stamps, made by S. & C., dated 9th September, 1875, and payable to defendant or order. On the same day C. deposited it with the plaintiffs, authorizing them to fill it in for the amount of certain paper due, and to fall due before the 22nd October. On the 21st October, the plaintiffs filled in the amount and affixed stamps sufficient to cover double duty, which were obliterated by writing across them the day on which they were affixed, namely, 21st October, 1875.

Held, affirming the judgment of the Common Pleas, 27 C. P. 320, that the stamps were not properly cancelled; for if affixed by the plaintiffs as agents of the maker, then under sec. 4 of 31 Vic. ch. 9, D., the date of the obliteration must accord with that of the note; and if the plaintiffs acted as subsequent holders, then under sec. 12, as substituted by 37 Vic. ch. 47, sec. 2, the initials or name as well as the date are required.

Semble, per BURTON and PATTERSON, JJ. A., that the latter part of this substituted sec. 12, applies to bankers as well as other holders, and that the plaintiffs could have validated the note by affixing double stamps as soon as they became aware of the defect.

It was urged that the instrument only became a note on the 21st October, when it was filled up; but, *Held*, that the "9th September" must be regarded as its date within the meaning of the statute.

After the note in this case had been double stamped, under 37 Vic. ch. 47, sec. 2, the plaintiffs applied for a new trial, or for a nonsuit, or for such other relief as it was competent for the Court to afford them. It appeared that they acquired knowledge of the particular defect in the obliteration of the stamps during the argument in the Court below, but that no application to re-stamp the note had been made until after the judgment of that Court had been pronounced, when it was refused.

Held, that the plaintiffs were not entitled to relief, as the note had not been double stamped as soon as knowledge of the particular defect was acquired.

Semble, that the judgment of the Court below on such a question is not appealable.

THIS was an appeal from the judgment of the Court of Common Pleas making absolute a rule *nisi* to set aside the verdict for the plaintiffs, reported 27 C. P. 320. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The appellants' reasons of appeal were :

1. The proper stamps were affixed to the promissory note in the pleadings mentioned, and were properly cancelled within the meaning of the statutes in that behalf.

2. The judgment in the Court below is erroneous in its conclusions as to the effect of the various Acts referred to as applicable to this case ; the statutes being 31 Vic. ch. 9 : 33 Vic. ch. 13: 37 Vic. ch. 47, D.

3. The promissory note in the pleadings mentioned did not become a promissory note until the twenty-first day of October, and if the cancellation did not agree with the date of the instrument (the ninth day of September), it did agree with the date when the instrument became of any validity as a promissory note, for previously to the date of cancellation of the stamps it was merely a piece of paper.

4. If the appellants are to be treated as the makers of the note, as the Court below treated them, their manager having filled up the blank sum, although the date of cancellation varies from the date of the piece of paper, it does not vary from the date when that piece of paper became a legal instrument; and if they are to be treated as subsequent holders, and the initials or name have not been put upon the stamps, as well as the date, it is submitted that in this case such initials or name were unnecessary, for the appellants never were subsequent holders of the said promissory note in the sense treated of by the said Acts.

5. The spirit and intent of the Acts is to preserve the validity of the instrument when it is clear, as it is in this case, that there was no intention to violate the law.

The following were the respondent's reasons against the appeal :—

1. The note sued on bears date the ninth day of Septem-

ber, 1875, is declared on as a note so dated, and was in fact so dated for the purpose of the stamp laws of Canada; the date on the face of a note as that on which it purports to have been made must be taken as the only and true date of making.

2. The said note was not sufficiently stamped.

3. The stamps on the said note were not sufficiently cancelled.

4. If the note is to be taken as dated on the twenty-first of October, there is a variance between the declaration and the note put in evidence; and the plaintiff not having asked leave to amend, the judgment of the Court would be sustained under the second plea.

5. The judgment of the Court below is correct for the reasons and on the authorities therein referred to.

6. The judgment of the Court below in favour of the defendant was right, on the ground that the making or endorsing of the note did not authorize the plaintiffs or any other person to put stamps on the note as representing the maker or endorser; and the only authority on the facts in this case to authorize the affixing the stamps is that given by the several Stamp Acts referred to in the judgments of the Court.

The case was argued on the 17th of June, 1877 (*a*).

R. Snelling, for the appellant.

M. C. Cameron, Q. C., for the respondents.

The arguments fully appear in the reasons for and against the appeal.

The following cases were cited: *Abrahams v. Skinner*, 12 A. & E. 763; *Bradley v. Bardsley*, 15 L. J. Ex. 115.

September 15, 1877 (*a*).—BURTON, J.A.—The note, which is the subject of this suit, when left in blank with the plaintiffs' manager, was dated and complete in all respects

(*a*) *Present*.—BURTON and PATTERSON, JJ.A., HARRISON, C.J., and BLAKE, V.C.

except the amount and the stamps. Whether it was so dated when endorsed is open to doubt. It was left with the plaintiffs by the makers with authority to fill it up for the then overdue paper and certain paper falling due on the 22nd day of the following month of October.

There were three modes of cancelling the adhesive stamp which it was necessary for the *makers* to affix for the purpose of making the note effectual.

First, by writing upon it the signature or part of the signature of the maker, or his initials.

Or, second, by writing upon it some integral or material part of the note itself.

Or, thirdly, by writing or stamping thereon the date at which it was affixed.

And the Act directs that if no integral or material part of the note, nor any part of the signature of the maker be written thereon, nor any date be so stamped or written thereon, or if the date do not agree with that of the instrument, such adhesive stamp shall be of no avail; and it is further declared that any person wilfully writing a false date, shall incur a penalty of \$100.

It is manifest, therefore, that the date appearing as the date of the note and the date on the stamp, if that mode of cancelling be adopted, are intended to be identical.

Benoit, the bank manager, received the note from the makers with authority to fill it up and make it a valid instrument.

If in affixing and cancelling the stamps he acted as agent of the makers, the stamping though sufficient in amount was ineffectual, inasmuch as the cancellation was not in accordance with either of the modes to which I have referred; and when it was negotiated by the bank it was either in that state or not stamped at all.

In either event they cannot recover, as if the stamps were affixed by the manager acting on the part of the bank, the stamps, though sufficient in amount, are still invalid by reason of the non-compliance with the requirements of what must now be read as the 12th section of the 31

Vic. ch. 9, which requires the stamps to be cancelled by the holder writing his initials on the stamp and the date on which it was affixed.

Benoit evidently intended to comply with the law by affixing double stamps, but he overlooked the provision which, under such circumstances, requires both the initials and the date.

The bank, however, had no actual knowledge that the stamps were not cancelled as the law required, and if, upon being made aware of the defect, they had immediately paid the double duty in the manner pointed out by the 12th section, I am at present inclined to think it would have been competent for the Judge at the trial, upon being satisfied that the omission to cancel was through mere error or mistake, and without any intention to violate the law, to have held the note validated by such subsequent stamping.

The 3rd section of the same Act, which substitutes a new section 12 for that originally enacted, and which has now to be read as part of the 31 Vic. ch. 9, applies to bankers and brokers only, and imposes an increased penalty on them in the event of their infringing the provisions of the Act.

But knowledge of the insufficiency of the stamp is essential, and if, upon negotiating a bill with such knowledge, the banker does not immediately affix and cancel the stamps within the meaning of the 31 Vic., he incurs a penalty of \$500, and is disabled from recovering on the instrument.

But I see no reason for holding that a banker negotiating a bill in good faith under the belief that the proper stamps were affixed and duly cancelled, should not be allowed, as fully as any other holder immediately on acquiring the knowledge, to remedy the defect in the mode pointed out in the 12th section.

That unfortunately was not done in the present instance, and we have no alternative but to affirm the decision of the Common Pleas, and dismiss the appeal, with costs.

PATTERSON, J. A.—The facts are simple The defendant endorsed at the request of Sparks and Crawford a form of promissory note which was in these words:—

Ottawa, 9th September, 1875.

Four months after date we promise to pay to the order of Jonathan Sparks, at the National Bank here,
————— for value received.

(Signed) SPARKS & CRAWFORD.

This note was to be used to take up other paper in the plaintiffs' bank. On the 9th September, one of the firm of Sparks & Crawford left the blank note at the bank. It had no stamp at that time. It remained in that state until 21st October, when the manager of the bank inserted the amount of \$4835.84 and affixed double the amount of stamps appropriate to the note as so completed, viz., \$2.94; and cancelled them by writing across them the date 21st October, 1875.

The only question raised before us is, as to the sufficiency of what was done as a compliance with the law relating to stamps.

The decision of the Court of Common Pleas is, that the Act has not been complied with, whether the bank manager is to be taken to have acted as agent for the makers or endorser of the note, or on behalf of the bank. This decision is impugned by the plaintiffs, and supported by the defendant, who also contends that the manager was not authorized to put stamps on the note as representing the maker or endorser, and that the only authority, on the facts of the case, to authorize the affixing of the stamps is that given by the Acts 31 Vic. ch. 9: 33 Vic. ch. 13 and 37 Vic. ch. 47 D.

The provisions of these Acts which affect the question are to the following effect:—

31 Vic. ch. 9 sec. 4: The duty on any such note, &c., shall be paid by making it upon paper stamped in the manner hereinafter provided to the amount of such duty: *or*

By affixing a stamp or stamps to the amount of such duty upon which the signature or part of the signature of

the maker, &c., or his initials, or some integral or material part of the instrument shall be written : or

The person affixing the stamp shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed, and such stamp shall be held *prima facie* to have been affixed at the date stamped or written thereon.

And if no integral or material part of the instrument, nor any part of the signature of the maker, &c., be written thereon, or if the date do not agree with that of the instrument, such stamp shall be of no avail.

Sec. 11 (as amended by 33 Vic. ch. 13) : " If any person in Canada makes, draws, accepts, indorses, signs, becomes a party to, or pays any promissory note, draft, or bill of exchange, chargeable with duty under this Act, before duty (or double duty as the case may be) has been paid by affixing thereto the proper stamp or stamps, such person shall thereby incur a penalty of \$100 ; and save only in the case of the payment of double duty, as in the next section provided, such instrument shall be invalid and of no effect in law or equity," &c.

Sec. 12 (as amended by 37 Vic. ch. 47) : Any holder of such instrument may pay double duty by affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty, and by writing his initials on such stamp or stamps, and the date on which they were affixed ; and where in any suit or proceeding in law or equity the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party, or at the proper time, or of any formality as to the date or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof, when he became such holder, had no knowledge of such defects, such instrument shall be held to be legal and valid, if it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even although such knowledge shall have been acquired only

during such suit or proceeding; and if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was through mere error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument, or any endorsement or transfer thereof, shall be held legal and valid, if the holder shall pay double duty thereon as soon as he is aware of such error or mistake; but no party who ought to have paid duty thereon shall be released from the penalty by him incurred as aforesaid.

37 Vic. ch. 47 sec. 3: "Any bank or any broker who makes, draws, or issues, or negotiates, presents for payment, or pays, or takes, or receives, or becomes the holder of any instrument not duly stamped, either as a deposit, or in payment, or as a security, or for collection or otherwise, *knowing the same not to be duly stamped*, and who does not immediately on making, drawing, issuing, negotiating, or presenting for payment, or paying, or taking, or receiving, or becoming the holder of such instrument, affix thereto and cancel the proper stamps within the meaning of the Act 31 Vic. ch. 9, shall incur a penalty of \$500 for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or in equity."

There are three periods at which the duty or double duty may be paid. 1st. When the note is made. 2nd. When any holder receives the note. 3rd., (under certain circumstances) when the holder first becomes aware of the error or mistake in the mode of paying the duty or defect in the amount.

Let us consider these in inverted order.

It is certain from the evidence that it was through mere error and mistake and without any intention to violate the law on the part of the plaintiff that the defects, if any, have been allowed to exist. The plaintiffs, when they be-

came the holders of the note and when they presented it for payment, cannot be said to have known that it was not duly stamped, as their manager, who received the note, and who, at the moment when it first became a note, affixed and cancelled the double stamps, intended to duly stamp it and supposed that he had done so. Therefore sec. 3 of 37 Vic. ch. 47, does not apply either to make the plaintiffs liable to the \$500 penalty or to invalidate the note.

I see no reason why, assuming the stamps defective, the plaintiffs might not, under the provisions of sec. 12, have paid double duty as soon as they became aware of the defect, as was done by the plaintiffs in *House v. House*, 24 C. P. 526, and in *Boyd v. Muir*, 26 C. P. 21.

Not having done so as soon as they acquired knowledge of the defect, it is now too late.

There can be no question that double duty was not paid in the manner prescribed by sec. 12, whether we treat the double stamps as having been affixed by the plaintiffs or by any party to the note, because only one of the two things required by the section was done. The date was written on the stamps, but the initials were omitted.

We are thus confined to the enquiry, was the note duly stamped when it was made.

The enactment of 31 Vic. ch. 9 sec. 3 is too clear and unambiguous to leave room for doubt. A stamp may be cancelled by writing thereon the date at which it is affixed; but when this mode of cancellation is adopted, the stamp shall be of no avail unless the date agrees with that of the instrument. Here the stamps were affixed on 21st October and cancelled with that date. The date of the instrument was 9th September.

It has been urged by Dr. Snelling that as the instrument first became a promissory note on 21st October, that date must for the purpose of the statute be taken to be the date of the note. We cannot adopt that view. This note was payable four months after date. It is not questioned that it fell due at four months after 9th September. No com-

plaint on that ground is to be found among the defendant's pleas. The date can have only one meaning. To hold otherwise would be contrary to abundant authority; and would be unsupported even by considerations of hardship or necessity. It was optional with the makers of the note to write the blank form on stamped paper or to stamp it at the time. It has been suggested that the amount was unknown which was to be inserted, and therefore the amount of stamps could not be ascertained. The evidence does not support this suggestion; for it shews that the note was intended to cover the amount of specific notes either then overdue or to mature on or before 21st October; so that, if there was a reluctance to risk a margin of over stamping, there was nothing to have prevented the exact amount being computed.

Questions analogous to that raised by Dr. Snelling have often been presented for adjudication, and the distinction between the date of an instrument, when it bears a written date, and the time at which it may become operative has always been distinctly preserved. The statute 27 H. VIII. C. 16 required that the enrolment of a deed of bargain and sale should be made within six months next after the date of the deed. A deed operates only from delivery, but the time for enrolment was always reckoned from the date and not from the time of delivery. In *Shep. Touch*, at p. 223, it is said that this was adjudged in Mich. 37 and 38 Eliz. Lord Coke says (2 Inst. 674) that though the indenture has a date and is delivered after, it shall take effect to pass from the bargainor from the delivery, for then it became his deed, and not from the date; yet the deed must be enrolled within six months from the date. In *Styles v. Wardle*, 4 B. & C. 908, 911, Bayley, J., said: "A deed has no operation until delivery, and there may be cases in which, *ut res valeat*, it is necessary to construe date, delivery. When there is no date or an impossible date, that word must mean delivery. But where there is a sensible date, that word in the other part of the deed means the day of the date and not of the deli-

very," He quotes several authorities for that proposition, and adds, "All the authorities give a definite meaning to the word *date* in general, but shew that it may have a different meaning when that is necessary *ut res valeat*."

A good deal of instructive discussion of the subject and of the authorities will be found in *Bell v. McKindsey*, 23 U. C. R. 162, 3 E. & A. 9.

I am of opinion that the appeal should be dismissed.

HARRISON, C. J.—The defendant is sued as the endorser of a promissory note, dated 9th September, 1875, for the sum of \$4835.84, payable four months after date.

If the instrument sued upon be from any cause not a valid promissory note there can be no recovery against the defendant as an endorser upon it.

Its validity is attacked on the ground that the stamps thereon were not properly cancelled under the Stamp Acts of the Dominion Legislature.

The only effect of a neglect to stamp, or of the improper cancellation of stamps, under the English statutes is to render the instrument inadmissible in evidence. See *Field v. Woods*, 7 A. & E. 114; *Jones v. Ryder*, 4 M. & W. 32; *Williams v. Gerry*, 10 M. & W. 296; *Crowther v. Solomons*, 6 C. B. 758. And the question whether or not the instrument offered in evidence is sufficiently stamped is, in England, for the decision of the Judge at Nisi Prius, without appeal: *Siordet v. Kuczynski*, 17 C. B. 251; *Tattersall v. Fearnley*, *Ib.* 368.

English cases, including the one cited on the argument by counsel for the appellant, cannot therefore be of assistance to us in the disposal of cases under our Acts, which are essentially different from the English Acts.

While the object of our Acts, like that of the English Acts, is to raise a revenue for the purpose of government, the effect of our Acts, where their provisions are not complied with, is to nullify the instruments for all purposes: *Baxter v. Baynes*, 15 C. P. 237; *Stephens v. Berry*, *Ib.* 548; *Ritchie v. Prout*, 16 C. P. 426; *Young v.*

Waggoner, 29 U. C. R. 35; *Lowe v. Hall*, 20 C. P. 244; *McKay v. Grinley*, 30 U. C. R. 54; *Escott v. Escott*, 22 C. P. 305; *Edmunds v. Hoey*, 35 U. C. R. 495.

The validity of the instrument under our Acts is made to depend on one or other of two considerations, and these are the amount of the stamps and the mode of affixing and cancelling the same.

The question now before us for decision belongs exclusively to the latter consideration—the mode of affixing and cancelling stamps.

For the purpose of identifying each stamp with the instrument to which it is attached, and to shew that it has not been before used, and to prevent its being thereafter used for any other instrument, the Legislature has deemed it necessary to enact a rigid mode of affixing and cancelling stamps in all respects essential to the validity of the instrument.

The duty under 31 Vic. cap. 9, sec. 4, on a note, draft or bill is to be paid—

1. By making it upon stamped paper to the amount of the duty,

2. Or by affixing thereto an adhesive stamp or adhesive stamps to the amount of such duty,

Upon which

1. The signature or part of the signature of the maker or drawer, &c.,

2. Or his initials,

3. Or some integral or material part of the instrument shall be written so as, as far as may be practicable, to identify each stamp, &c.,

4. Or the person affixing such adhesive stamp shall, at the time of affixing the same, write or stamp thereon the date at which it is affixed.

If no integral or material part of the instrument, nor any part of the signature of the maker, &c., nor any date be so stamped or written thereon, or if the date do not agree with that of the instrument, such adhesive stamp shall be of no avail, &c.

Where a blank promissory note made by one F. payable to defendant, or order, and endorsed by defendant, was sent by F. to the agent of the Bank of Montreal at Stratford, where it was payable, to retire a previous note, the agent received it on 27th October, and on 2nd November dated it 30th October, 1869, and affixed the proper stamps on it, which he obliterated on the same day, but marked the obliteration as of 30th October "30, 10, '69." it was held by the Court of Queen's Bench, in an action by the endorsee, that the note was invalid under 31 Vic. cap. 9, for "if made on 27th or 28th October it had not *then* the stamps affixed, and if on 2nd November the stamps bore a different date : " *Hoffman v. Ringler*, 29 U. C. R. 531.

The note here, although dated 9th September, 1875, was not stamped till 21st October, 1875, but was then double stamped, and the stamps obliterated as of 21st Oct., 1875.

Unless the fact of double stamps in this case makes some difference between the two cases, *Hoffman v. Ringler*, although not cited to the Court of Common Pleas, if good law, is decisive of the question now before us.

Although more than six years since *Hoffman v. Ringler* was decided, it has never been questioned and I see no reason to question it. It cannot, I think, be doubted consistently with the positive requirements of the Legislature.

Then does the fact that the note in the case before us was double instead of single stamped make any difference? It is argued that under the operation of 31 Vic. cap. 9 sec. 12, as amended by 37 Vic. cap. 47, the affixing and cancellation of double stamps by the manager of the plaintiffs has given validity to the note.

The object of the 31 Vic. cap. 9 sec. 12 as amended by 37 Vic. cap. 47 sec. 2 is to enable the holders, under particular circumstances stated, to affix double stamps and thereby give validity to the instrument.

The original enactment gave rise to several decisions in Courts which, in their turn, gave rise to subsequent amending Acts of the Legislature,

These decisions in this Province are: *Stephens v. Berry*, 15 C. P. 548; *McGalla v. Robinson*, 19 C. P. 113; *Henderson v. Gesner*, 25 U. C. R. 184; *Kirby v. Hall*, 21 C. P. 377; *Woolley et al v. Hunton et al*, 33 U. C. R. 152; *Escott v. Escott*, 22 C. P. 305; *Joseph Hall Manufacturing Co. v. Harnden et al*, 34 U. C. R. 8; *House v. House*, 24 C. P. 526; *Waterous v. Montgomery*, 36 U. C. R. 1; *Boyd v. Muir*, 26 C. P. 21.

Whatever the 31 Vic. cap. 9 sec. 12 may have been, we have now to read it as it is in sec. 2 of 37 Vic. cap. 47.

The 31 Vic. cap. 9 as amended by 37 Vic. cap. 47 sec. 2, now enables any holder of the instrument to pay double duty.

1. By affixing to such instrument a stamp or stamps to the amount thereof, or to the amount of double the sum by which the stamps affixed fall short of the proper duty;
2. *And* (not *or*) by writing his initials on such stamp or stamps, and the date on which they are affixed.

And where, in any suit or proceeding in law or equity, the validity of any such instrument is questioned by reason of the proper duty thereon not having been paid at all, or not paid by the proper party or at the proper time, or of any formality as to the date, or erasure of the stamps affixed having been omitted, or a wrong date placed thereon, and it appears that the holder thereof when he became such holder had no knowledge of such defects, such instrument shall be held to be legal and valid:—

1. If it shall appear that the holder thereof paid double duty, as in this section mentioned, so soon as he acquired such knowledge, even although such knowledge shall have been acquired during such suit or proceeding;

2. And if it shall appear in any such suit or proceeding to the satisfaction of the Court or Judge, as the case may be, that it was through error or mistake, and without any intention to violate the law on the part of the holder, that any such defect as aforesaid existed in relation to such instrument, then such instrument or transfer thereof shall be held legal and valid if the holder shall pay the double duty thereon as soon as he is aware of such error or mistake.

Then as to banks and brokers there is this further provision: "Notwithstanding anything in the Acts before mentioned, or in this Act, from and after the first day of August next (1874) after the passing of this Act, any bank or any broker who makes, draws, issues, or negotiates, presents for payment, or pays, or takes, or receives, or becomes the holder of any instrument not duly stamped, either as a deposit, or in payment, or as a security or for collection or otherwise, *knowing the same not to be duly stamped*, and who does not immediately on making, drawing, issuing, negotiating, or presenting for payment, or paying, or taking, or receiving, or becoming the holder of such instrument, affix thereto and cancel the proper stamps within the meaning of the Act 31 Vic. cap. 9, shall incur a penalty of \$500 for every such offence; and shall not be entitled to recover on such instrument, or to make the same available for any purpose whatever, and any such instrument shall be invalid and of no effect in law or equity."

Bankers and brokers are, from their callings, supposed to be thoroughly familiar with the law regulating the stamping of bills and notes. If such persons deal in the manner mentioned with instruments not duly stamped, *knowing* that they are not duly stamped, they become subject to the heavy penalty of \$500.

The instrument sued on, although dated 9th September, never became a note till 21st October, when the amount payable was filled in by the manager of the plaintiffs. He could not on that day obliterate the single stamps as of the day of the date of the note. What he did on that day he did as the agent of those who had entrusted him with the note, and not as the manager of the bank; and what he did had relation to the date previously placed on the note: *Marngy v. Swarth*, 1 M. & S. 87. In this respect the case falls under the authority of *Hoffman v. Ringler*, 29 U. C. R. 531.

It is, I think, impossible to hold that a bank, who manufactured a promissory note as Mr. Benoit did this note,

acquire a note so as to enable the bank, under the statute, to place double stamps on it and give it validity as a note received by the bank in the course of its business. It is the business of a bank to discount notes already made, not to manufacture notes for the purpose of discount.

This case is a good illustration of the inconvenience, to say the least of it, of a contrary practice.

But conceding that the note was one acquired by the bank in the course of its business, and that the manager had the power, under the statute, immediately to place double stamps upon it and give it validity, can it be said that these stamps, although sufficient in amount, were so obliterated by the bank manager as to comply with the requirements of the statute? Now, between the obliteration of single stamps and the obliteration of double stamps there is this marked difference, that single stamps may be obliterated by affixing on the stamp the signature or part, of signature *or* date, but double stamps can only be obliterated by the initials, &c., *and* the date—the latter to be the date on which they are affixed.

The manager of the plaintiffs placed double stamps on the note, and obliterated them of the date of affixing them, but omitted to write either his own initials or those of the bank on them.

The latter omission, in my opinion, leaves the note just where it was before any stamps were placed on it—an invalid instrument.

The note remains invalid unless certain things are done to give it validity. All these things are necessary to give it validity. The omission of any one of them is, under the Act, just as serious as the omission of all of them.

The appeal must, in my opinion, be dismissed, with costs.

BLAKE, V. C.—The plaintiffs have in this case sought to cancel the stamps by writing thereon the date at which they were affixed. The stamps thus bear date the 21st of October: the note is dated 9th of September. The statute says: "If the date do not agree with that of the instrument

such adhesive stamps shall be of no avail, and such instrument shall be invalid and of no effect in law or in equity." It is therefore impossible for the plaintiffs to succeed in this action. No application was made for leave to remedy the mistake in due time, and so the question of the position of banks in this respect under the Act is not raised. I think the appeal should be dismissed, with costs.

Appeal dismissed.

IMMEDIATELY after the judgments in this case had been delivered, the counsel for the appellants asked the Court to stay the certificate until he could make an application to take the note out of Court for the purpose of double stamping it, alleging that the Court of Common Pleas had refused a similar application.

The Court granted the application, and subsequently, after double stamps had been affixed, gave leave to apply for an order granting a new trial, or for a nonsuit, or for such other relief as to the Court might seem meet.

It appeared from the affidavits filed on behalf the appellants, that the irregularity in stamping the note did not arise from any desire on their part to defraud the revenue, but solely from error and mistake: that although there was a plea of "no stamps," the objection to the particular defect in the obliteration of the stamps was not taken at the trial, and was not called to the attention of their counsel until the argument of the rule *nisi* in the Court below: that after judgment had been given by that Court, making the rule absolute to enter a verdict for the defendant on the ground that the note was improperly stamped, their counsel applied for leave to double stamp it, but the Court refused the application, as they considered that the curative clause did not apply to bankers and brokers.

The respondent filed an affidavit stating that when he was examined under the Administration of Justice Act, he pointed out to the appellants' counsel that the date on the

stamps differed from that on the note, and that the said stamps did not bear the initials of the holders or makers thereof; and that his counsel took the same objection at the trial.

The motion was argued on the 14th January, 1878 (*a*).

R. Snelling for the appellants. The Court of Appeal has power to grant the relief asked in one of the alternatives. Under Con. Stat. c. 38, sec. 22, O., the Court has all the powers and duties as to amendment, "and otherwise," of the Court or Judge from which or whom the appeal is had, together with full discretionary power to receive further evidence on questions of fact; and by section 23, the Court has power to dismiss an appeal or give any judgment, or make any decree or order that ought to have been made, &c. It is plain, therefore, that the Court has power to deal with this application in as ample a manner as a Court of original jurisdiction. Having thus shown that the Court has jurisdiction to act in the matter, it is clear that the appellants are entitled to the relief sought, as the note was double stamped, and properly obliterated as soon as possession of the note could be acquired after the defect in obliteration had been adjudicated upon by the Court below. No particular time is stated in section 2, 37 Vic. c. 47, when the holder must affix stamps; and the note in question is now stamped in compliance with the law regulating stamps: *House v. House*, 24 C. P. 538.

M. C. Cameron Q. C., and *D. McMichael*, Q. C., for the respondent. This Court was created by Statute, and cannot assume any jurisdiction which is not given it by Statute. The Court had no power to stay the certificate, as it was *functus officio* as soon as the judgment was pronounced; and it then ceased to have any control over the subject matter of the suit. The case is entirely different

(*a*) *Present.*—BURTON and PATTERSON, JJ.A., HARRISON, C.J., and BLAKE, V. C.

from a judgment in the Court below, where they are considered to be seized of the matter during term, and can alter the judgment any time during that period. [BURTON, J. A. No judgment was ever pronounced by this Court, as after the Judges had delivered their opinion the counsel for the appellants interposed, and asked to be allowed to remedy the defect].—The permission to double stamp the note was a matter entirely within the purview and discretion of the Court below, and it is well settled that there cannot be an appeal on a matter of discretion. The Court of Appeal has an appellate jurisdiction only, and cannot do in this matter something the Court below should have done. At anyrate the words “and otherwise,” in Con. Stat. ch. 38, sec. 22, O., do not extend the jurisdiction to matters of discretion. The plaintiffs were never entitled to double stamp the note, as they were not subsequent holders; but if they were, it is now too late, as under the statute the stamps cannot be affixed after the trial. The evidence shews that the plaintiffs had knowledge of the defect before the trial, as the defendant called their attention to it when he was examined under the A. J. Act, 1873. At all events, the application should have been made during the argument in term when the objection was expressly taken. A nonsuit cannot be granted on new facts brought before this Court.

Snelling, in reply. There can be no doubt that it was intended to give this Court the same powers as the Court of original jurisdiction; and although the relief sought here may be within the purview of the Court below, it can be granted by this Court. It makes no difference whether the appellants are “subsequent holders” or not, as the words of the statute now are, “any holder” without any qualification. What took place at the examination of the defendant under the Administration of Justice Act, should not be brought up here for the first time to shew that the appellants knew of the defect. The only objection taken at the trial was, as to the date. It cannot be held that “trial,” in the Act, only refers to the proceedings at *Nisi Prius*.

January 16, 1878 (a). BURTON, J.A.—Upon the announcement of an intended decision in this case differing from that of the Common Pleas, in which that Court held that the curative section of the Act 33 Vic. ch. 13, sec. 12, as amended by 37 Vic. ch. 47, did not apply to bankers and brokers, the counsel for the plaintiffs applied to us to stay the certificate until he could make an application to take the note out of Court for the purpose of re-stamping it, alleging that the Court of Common Pleas refused an application for a similar purpose.

It appeared to us at the time that there had been a miscarriage, as the objection in its present form had not been taken at the trial, where it is clear that the learned Judge who presided would have held the plaintiffs entitled to affix the double stamps; and as the amount was large, we thought it right to afford the plaintiffs an opportunity of applying to us after re-stamping the note, if so advised, for an order granting a new trial, or for a nonsuit, or for such other relief as it was competent for us to afford them.

On the argument yesterday, several objections were taken to our granting any relief, and among others that the proper stamps could not be affixed after the trial. I am not prepared to adopt that view of the statute; it is at the trial generally that the question will arise, or where the Court at all events will be called upon to decide whether it was through error or mistake, or without any intention to violate the law on the part of the holder, that the informalities as to dates or erasures of the stamp existed; but it does not follow that the Court may not, at any stage of the suit, interfere and allow the note to be stamped; but then it must be shewn that the double duty was paid so soon as the holder acquired such knowledge. Now granting that the plea and the formal objection at *Nisi Prius* were not sufficient to call the holder's notice to the particular defect, so as to fix him with knowledge, upon which

(a) *Present*.—BURTON and PATTERSON, JJ. A., HARRISON, C. J., and BLAKE, V. C.

I desire to express no opinion, it is clear that upon the argument in term the particular objection was called to the attention of the plaintiffs' counsel, and very shortly afterwards to the plaintiffs themselves. It became necessary for them then to pay the double duty if they desired to avail themselves of the privilege granted by the 12th section. It is not shewn that any application was made to the Court for the note to enable them to stamp it, until after the judgment was given. If it was not made, the plaintiffs have neglected to avail themselves of the opportunity of stamping the note so soon as they acquired the knowledge of the defects, which alone would entitle the Court to hold the note legal and valid. If they did make the application, we must assume, I think, that the Court was not satisfied that the plaintiffs were in a position to avail themselves of the Act, either from neglect to do so in time, or for some other cause. I apprehend that their decision on such a question is not an appealable matter, and whether appealable or not, is not appealed against.

The motion must be discharged, with costs.

PATTERSON, J. A., HARRISON, C. J., and BLAKE, V. C., concurred.

Motion discharged, with costs.

KAY V. WILSON.

Redemption—Possession by mortgagee—Mortgage—Statute of Limitations—Wild lands.

In 1835 D. sold certain wild lands to S., who on the same day mortgaged them to him to secure payment of the purchase money in four years. S. sold and conveyed his equity of redemption to K. in 1838; and in 1842, default having been made under the mortgage, D. filed a bill of foreclosure against S., on which a final decree was obtained in 1845; but to this suit K., through some oversight, was not made a party. K. died in 1876, and in June of that year the plaintiff, his heir-at-law and devisee, heard of K's claim on this land for the first time, and thereupon filed a bill to redeem. The defendants claimed under conveyances from D., made after the foreclosure.

It was proved that D. had gone over the land in 1839 or 1840, after his title had become absolute at law, to see if there were any trespassers upon it: that he then asked one H. to look after the land, and offered to sell it to him: that he sold to one S. in 1841, who frequently went upon the land and had it surveyed in 1853; and that the taxes had been paid by D. and S. and those claiming under them.

Held, on appeal from the decree of Spragge, C., which was affirmed, 24 Gr. 213, that there was sufficient evidence of possession having been acquired by the mortgagee more than twenty years before the bill was filed, and that the plaintiff's right to redeem was barred.

Held, also, that where actual possession is once obtained by a mortgagee in assertion of his legal right of entry it need not be maintained continuously for twenty years.

This was an appeal from a decree of the Chancellor dismissing the plaintiff's bill, reported in 24 Grant 213. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

The following were the appellant's reasons of appeal:

1. In the Court below the case was dealt with as one of vendor and purchaser, and the doctrines applicable in cases of specific performance were invoked, whereas the parties occupied the position of mortgagor and mortgagee, and the plaintiff's rights were not for that reason dependent on the discretion of this Court.

2. The plaintiff had a vested estate or interest in the proceedings as owner of the equity of redemption, and no facts were proved which extinguished his right to redeem.

3. The defendant Wilson failed to bring himself within the protection of the 21st section of the Statute of Limitations (Consol. Stat. U. C. ch. 88, p. 873), inasmuch as he failed to prove that he had obtained the possession of the

land or the receipt of the rents and profits thereof, more than twenty years before the plaintiff's bill was filed.

4. To enable a mortgagee to claim the benefit of this statute, there must be an actual and not merely a constructive possession; and no such possession was proved in this case: *Smyth v. Simpson*, 7 Moo. P. C. 223.

5. The facts proved in *Skæ v. Chapman*, 21 Grant 534, were very different from those now in evidence, and the plaintiff if necessary submits that the doctrine of *Skæ v. Chapman* is contrary to the weight of authority.

6. The evidence shews that a money compensation will sufficiently indemnify the defendant for his outlay on the premises in question; it is not inequitable for this reason to give relief to the plaintiff, and all proper terms may be imposed on giving such relief.

The respondent Blackburn's reasons against the appeal were:

1. The respondent Blackburn submits that the decree herein, and the judgment upon which it is founded, is correct, and should for the reasons stated in the said judgment be affirmed.

2. And because it was shewn that the plaintiff and those through whom he claims were out of possession for more than twenty years next before the filing of the bill in this cause, and the respondent being then in possession the plaintiff was not entitled to any rights or relief as against the defendant.

3. And because the property in this cause was of a fluctuating value, and time was of the essence of the contract; and the Court cannot now give adequate relief to all the parties nor reinstate the parties in their original position.

The respondent Wilson's reason's against the appeal were:

1. The alleged claim of the plaintiff to redeem was barred by the Statute of Limitations.

2. Nothing passed by the deed from Sharpe to Kay, and the deed was void for the reason stated in this defendant's answer.

3. There is no evidence that Thomas Kay accepted the

conveyance from Sharpe to him, and his conduct proves that he never did accept it.

4. The presumption from the evidence is, that Thomas Kay either reconveyed or disclaimed the equity of redemption conveyed to him by Sharpe.

5. The presumption is, that Thomas Kay was aware of the foreclosure by Drake, and that such foreclosure was a valid and effectual foreclosure of the equity of redemption.

6. This defendant was entitled to urge as a defence that Steers was a *bonâ fide* purchaser for value without notice, without setting it up specially in his answer, and was entitled to amend, if necessary, for the purpose of setting it up, and is now entitled to amend for that purpose.

7. The judgment of the Court below is right for the reasons set forth.

The case was argued on the 19th June, 1877.

J. A. Boyd, Q. C., for the appellant.

J. D. Armour, Q. C., for the respondents.

The arguments fully appear from the reasons for and against the appeal.

The following additional authorities were cited:—

For the appellant: *Moore v. Cable*, 1 Johns. Chy. 387; *Mahar v. Fraser*, 17 C. P. 414; *Batchelor v. Middleton*, 6 Ha. 75; *Coldwell v. Hall*, 9 Gr. 112; *Grand Falls Co. v. Worster*, 15 N. H. 412; *Hooper v. Wilson*, 12 Ver. 695; *Raffety v. King*, 1 Keen 601; *Blake v. Foster*, 2 Ball & B. 387, 564; *Macdougall v. Purrier*, 4 Bligh. N. S. 440; *Lucas v. Dennison*, 13 Sim. 584; *Thorp v. Facey*, 12 Jur. N. S. 741, 35 L. J. C. P. 349; *Lloyd v. Henderson*, 25 C. P. 253; *Casburne v. Inglis*, 2 Jac. & Walk. 194; *Christopher v. Sparke*, 2 Jac. & Walk. 235; *Downe v. Morris*, 3 Ha. 404.

For the respondents: *Pringle v. Allan*, 18 U. C. R. 578; *Cuthbertson v. McGillis*, 2 C. P. 133; *Taylor v. Proudfoot*, 9 U. C. R. 503; *McNeil v. Donaldson*, 12 U. C. R. 255; *Dunlop v. McNab*, 5 U. C. R. 289; *Stubbs v. Broddy*, 27 C. P. 239; *Haight v. Munro*, 9 C. P. 462; *Roylance v. Lightfoot*, 8 M. & W. 553; *McAulay v. Allen*, 20 C. P. 417;

Brown v. Wood, 17 Mass. 68; *Williams v. Eytton*, 2 H. & N. 771; *Regina v. Inhabitants of Long Buckby*, 7 East 45; *Trust and Loan Co. v. Covert*, 32 U. C. R. 222; *Oliver v. Mowat*, 34 U. C. R. 472; *McLean v. Whitesides*, 5 O. S. 92; *Wilson v. Wessells*, 5 O. S. 282; *Eades v. Maxwell*, 17 U. C. R. 175; *Hill v. Long*, 25 C. P. 265; *Re Higgins*, 19 Gr. 303; *McLeod v. Austin*, 37 U. C. R. 443; *Tenny v. Jones*, 10 Bing. 75; *Little v. Wingfield*, 11 I. C. L. 63; *Doe v. Hilder*, 2 B. & Al. 782; *McLean v. Fish*, 5 U. C. R. 295; *Heck v. Knapp*, 20 U. C. R. 360; *Casselman v. Hersey*, 32 U. C. R. 340; *Mann v. English*, 38 U. C. R. 240; *Brown v. Notley*, 3 Ex. 219; *Heyland v. Scott*, 19 C. P. 165; *Pickering v. Lord Stamford*, 2 Ves. 272; *Mulholland v. Conklin*, 22 C. P. 372.

September 13, 1877. BURTON, J. A. (*a.*)—The decree in this case may, I think, be sustained on the ground that the bill was not filed within twenty years from the time when the mortgagee obtained possession.

In order to bar the true owner under the statute, there must not only be an entry on the land, but a visible and notorious continuance of the possession so taken during the statutory period. Mere surveys, occasional occupancy, as by the use of a sugar bush during the season, the cutting of timber, even accompanied by the payment of taxes, ought not to have the effect of defeating the true owner; but to have that effect, the possession relied on should be so open continuous and notorious that the owner may be presumed to have notice of it. A distinction has been drawn, and very properly drawn, between the case of a person taking possession without any colour or right, and that of one entering under colour of title by some written document, who would thereupon acquire in law possession to the extent of the boundaries contained in the writing, although the title assumed to be conveyed by it might be good for nothing, whilst the possession of the other would comprise no more than the portion actually enclosed and occupied; but in

(*a.*) *Present.*—BURTON, PATTERSON, MOSS, JJ. A., and PROUDFOOT, V. C.

both cases an actual visible occupation or possession of some portion of the land is necessary for the full period of twenty years.

But what reason is there for requiring such a construction to be placed upon the 21st section of the Consol. Stat. U. C. ch. 88, which provides that "When a mortgagee has obtained the possession or receipt of the profits of any land comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem but within twenty years next after the time at which the mortgagee obtained such possession or receipt?"

If the land had been in the possession of any person either claiming through the mortgagor or not, and the mortgagee after default made in his mortgage had dispossessed such person, whether under legal process or otherwise, it could not, I suppose be contended that the mortgagor's right to redeem would not be extinguished at the expiration of twenty years from such entry, although immediately after the expulsion of the occupant the mortgagee had left the premises and they had remained vacant ever since.

Is there then evidence here of such taking possession by the mortgagee more than twenty years before the filing of the plaintiff's bill?

On the 13th of October, 1835, Francis Drake, the grantee from the Crown of the lands in question, sold them to John Sharpe, who on the same day executed a mortgage to him to secure the purchase money at the expiration of four years. Default was made in payment, and in 1842 a bill was filed by Drake to foreclose.

In June, 1838, Sharpe conveyed other lands and his equity of redemption in these to Thomas Kay, whose heir at law the plaintiff is.

Kay, by some over-sight, was not made a party to the foreclosure proceedings; but a final decree was obtained against Sharpe, and from that period Drake dealt with the premises as if he were the actual owner, and sold as absolute owner to Mrs. Steers. Wm. Hardy, although unable

to fix the precise date, thinks it was in 1839, '40, or '41—some time after Drake's title had become absolute at law, and when, even if there was a clause of re-demise in the mortgage, Drake was entitled to enter for condition broken—that he did go upon the land to ascertain if there was any person trespassing upon it, and placed it in the charge of Hardy to protect it against trespassers. He shortly afterwards instituted the proceedings by which he intended to perfect his title to the mortgaged premises, and, in the full belief that he was absolute owner, sold to Steers.

The negotiations for the sale to Mr. Steers were not finally carried out by a conveyance till 1846, but Mr. Steers gives evidence of several acts which, though quite insufficient for the purpose of establishing possession as against the true owner, are, I think, ample evidence of taking possession by virtue of and for the purpose of the mortgage against the mortgagor, or any person claiming through him.

Had Mr. Drake been put formally in possession under the decree, although defective in consequence of Kay not being a party, or had he taken proceedings in ejectment as upon a vacant possession, and been put actually in possession under a writ of *hab. fac. poss.*, it could scarcely be contended that that would not be an obtaining possession within the meaning of the Statute, so as to bar any proceedings by the mortgagor but within twenty years from that period. It was surely unnecessary to go through those mere forms.

It is evident that Mr. Drake, by taking the proceedings, was intending to perfect his title; and it is not too much to assume that in going upon the lands and placing them under the care of Mr. Hardy, it was his intention to take possession to the extent to which that description of property is susceptible of being taken possession of. To hold that a mortgagee having once taken possession is bound to retain the actual occupation by himself or his tenants, so as to bar the equity of the mortgagor, would be imposing an obligation upon a mortgagee which, I apprehend, was never intended.

I think there is evidence here of such possession having been taken more than twenty years before the bill filed, and that the right of the plaintiff to redeem was barred.

I am of opinion, therefore, that the appeal should be dismissed with costs.

PATTERSON, J. A.—This is a bill to redeem premises in the township of Chatham, which were mortgaged by Sharpe to Drake in 1835. On the 2nd of June, 1838, Sharpe conveyed his equity of redemption to the plaintiff's ancestor, Thomas Kay of Montreal. In 1845 Drake foreclosed the mortgage, but only against Sharpe; taking no notice of Kay who was the real owner of the equity of redemption. The defendants claim under conveyances from Drake, made after the foreclosure. The answers rely upon the Statute of Limitations, amongst other grounds of defence.

The Consol. Stat. U. C. ch. 88, sec. 21, enacts that "When a mortgagee has obtained the possession or receipt of the profits of any land, or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor, or of his right of redemption, has been given."

The corresponding enactment in England is 3 & 4 Wm. IV. ch. 27, sec. 28.

The mortgage was not produced. The only evidence of it was the registered memorial, which shewed that the mortgage was dated 14th October, 1835, and was to secure £300, payable on the 14th of October, 1839.

The plaintiff was sworn, and shewed that his father, the assignee of the equity of redemption, had been a merchant in Montreal, where he died in 1863. The plaintiff was born in 1836, and lived all his life in Montreal. He was an executor of his father and the sole heir. He had never heard or known anything, either from his father, or from his father's books, or in any way, about the land, or any

claim on his father's part to it, until June, 1876, when he seems to have heard of it on the occasion of his being in Chatham where he saw a person who had had some charge for his father of other lands in a place called Louisville, which had been conveyed to his father by the same deed from Sharpe which conveyed the Chatham lands.

Mr. Hardy says he was acting as a kind of guard to prevent cutting timber on the land, at Drake's request: that he went with Drake over part of the land to see if there was any timber cut; and that Drake advised him to buy the land, and offered him the 600 acres for \$1,200, and to give him twelve years to pay it, at six per cent. He says the land was then a perfect wilderness, and that \$1,200 would at that time have been a fair value for it. He further said that he was in the habit of meeting Drake from time to time, when Drake would ask him about the land, if things were all right. This witness thinks it was between 1839 and 1840 when he was on the land with Drake. He speaks of the increase of value by reason of roads and ditches, and says that as much as \$18 an acre has been paid for some of the land.

Thomas Steers deposed that he had been Crown Lands agent in Chatham from 1839 to 1844. He bought the land from Drake in 1841 or 1842 or 1843, though the deed, which is to Mrs. Steers, was not made till 1846. He said he was very frequently on the land to see the nature of the land, and to see that no trespass was committed on it, and that he always paid taxes on it, until it got into the possession of the defendant Wilson. He says he gave leave to the Arnolds and to Claxworth to cut hay on the land soon after he bought from Drake, and while he still lived in Chatham; and in 1853, he saw cocks of hay on it. Not very long after he bought from Drake, he told Cosgrove, who looked after the Louisville property for Kay, that he had bought the land from Drake. Cosgrove asked him if he had bought it, and so did Eberts. In 1853 he had the land surveyed, and found that it contained 640 acres.

The County Treasurer was called to shew how the taxes had been paid. He shewed that in 1851 the land was returned in arrear and was advertised for sale, but was not sold. The treasurer cannot say how the sale was prevented. Mr. Steers says that he stopped it by sending his receipts and shewing that he had paid the taxes from year to year. After that the taxes were from time to time in arrear, and portions of the lands were sold for taxes, but always redeemed.

The defendant Wilson shews that he had to pay very large sums for arrears of taxes as well as for the current taxes of different years, including those for draining and ditching.

He became connected with the title by lending money in 1854 to Mr. or Mrs. Steers on a mortgage which he foreclosed in 1860. He first saw the land in 1863. No person was then on the land claiming it.

This is the substance of the evidence touching the operation of the Statute.

It is quite clear that Kay never had actual possession.

The question in whom was the constructive possession, assuming the mortgage deed to have contained no re-demise, is not, in my view, of any importance.

Section 21 undoubtedly requires actual possession or actual receipt of the profits of the land: *Darby & Bos.* on Limitations, 222, 261. The situation of the mortgagee under a mortgage which gives him an immediate right of entry, is just the same as where there is a re-demise until default, and default has been made. But, if actual possession is once obtained by the mortgagee in assertion of his legal right of entry, I find no authority for holding that it must be maintained continuously; nor do I know any principle on which, in the absence of actual occupation, it can be said that constructive possession has reverted to the mortgagor. The doctrine of constructive possession becomes of consequence in inquiring when the right to make an entry or distress, or to bring an action, which under the first section of the Act must be asserted within twenty years,

first accrued. Section 21 deals with cases of a different class.

In the one case the person having the legal right is dispossessed, or has discontinued the possession, and seeks to re-enter. In the other the possession and the legal right are united in the same person. If, therefore, we find that the mortgagee obtained the possession over twenty years before this suit, the fact being that the mortgagor never regained it, the Statute applies to bar the right to redeem.

I express no opinion as to what effect the resumption of possession by a mortgagor during the twenty years would have on his right to redeem after the lapse of that period.

The bill was filed on 27th June, 1876. Was possession obtained before 27th June, 1856?

In my opinion this question must be answered in the affirmative.

No explanation is given, and none can be given of what seems a remarkable over-sight in Drake's foreclosure suit, viz., the omission to make Kay a party, notwithstanding the registration of Sharpe's deed to Kay. This may have been a mere oversight, and it may be that there is sufficient in the facts shewn to found a reasonable presumption of a reconveyance by Kay to Sharpe.

However this may have been, it cannot be disputed that Drake supposed he had obtained by his foreclosure an absolute title against all the world. When he asked Hardy to look after the land and keep off trespassers; when he went upon the land with Hardy; when he offered it for sale to Hardy; and when he sold it to Steers; he undoubtedly thought it was his own, and dealt with it as his own. When Steers from time to time walked over the land to examine its quality and to see if trespasses were being committed; when he gave permission to the neighbours to cut hay upon it; when he had it surveyed; and when from year to year he paid the taxes; he knew no owner but Drake, or himself, or his wife, as the case happened to be. All this was long before 1856. If possession can ever be obtained of wild lands, I take it that possession is shewn

to have been obtained by Drake and by Steers. Whatever they did was done as owners, intending to act as owners and believing that they were acting as owners. If it all falls short of proving possession, it must be because the acts were themselves insufficient, not because of the spirit and intent with which they were done.

I think the acts proved are, under the circumstances conclusive proof that the mortgagee had obtained possession

A test, though perhaps an imperfect one, may be found by supposing a trespasser to have entered upon the land, say, in 1855. Who could have maintained an action against him? Not Kay, for he had no possession either actual or constructive, nor any right to possession; while the legal right, which was in the mortgagee, had been asserted by such actual possession as the property was susceptible of.

A large number of cases have been cited to us in the course of the able and exhaustive argument of the various points discussed. I have examined all those cases, but it is not necessary for the purpose of this judgment to refer to more than a few of those which bear on the question of possession.

Heck v. Knapp, 20 U. C. R. 360, was an action of trespass *quare clausum fregit*. The plaintiff had the legal title. The question was, whether he had sufficient possession to maintain trespass. The case is not a strong one, because the question was partly whether the defendant had such possession as to destroy the constructive possession of the plaintiff; but it was held that the plaintiff had actual possession by reason of his having had the boundaries surveyed, and having entered on the land to forbid the defendant trespassing.

In *Casselman v. Hersey*, 32 U. C. R. 333, Wilson, J., uses language (at p. 340) which almost fits the facts of this case. He says: "I think there is quite sufficient evidence of possession of the land in the plaintiff to have entitled him to recover against the defendant as a mere wrong-doer. The plaintiff had a paper title for more than twenty years,

apparently genuine, from the patentee downwards. He is in possession of the muniments of title; he has paid taxes ever since he purchased the land; he has protected it from injury; he has made persons settle with him for cutting upon it. The defendant and those cutting with him recognized his title, and proposed he should be settled with for the damage done to his land. That is just the kind of possession which the actual owner can be expected to have of his wild land."

In *Davis v. Henderson*, 29 U. C. R. 344, the same learned Judge, at p. 355, said: "Now how is wild land to be possessed? It is settled that it need not be enclosed. What better test can there be of its possession than that the person whose possession is questioned should have used it just the same as any other owner uses his wild land, by asserting title to it, by giving licenses to cut timber from it or to pass over it, by excluding others from cutting or travelling over it, by cutting or travelling over it himself at his pleasure, by preserving the timber upon it, though he never has cut a stick himself; or by any other acts or evidence from which it may fairly be presumed he has taken the possession of the wood land as well as of the cleared."

In *Heyland v. Scott*, 19 C. P. 165, Hagarty, C. J., used this language, at p. 172: "We are not prepared to hold that unenclosed woodland in this country can never be the subject of a twenty years' possession. If fencing and cultivation can alone constitute a possession, then title to open woodland can never be acquired against the true owner."

Now—keeping in mind that no question arises here as to whether the possession, if obtained of one part of the land, extended to the whole; because if Drake or Steers obtained possession at all it was under a paper title to the whole, and was therefore possession of the whole; and further, that a less stringent rule of evidence suffices when the fact of taking possession in pursuance of a legal right has to be established than when, as in most of the cases, the effort is to maintain the possession of a wrong-doer against the

legal owner—the authorities I have cited are amply adequate to shew that in holding that the mortgagee is shewn to have obtained possession before 1856, we are not giving to the facts in evidence any force or effect beyond what has been heretofore recognized and acted upon in our own Courts.

This view of the case makes it unnecessary to decide whether the equitable considerations on which the learned Chancellor acted in *Skae v. Chapman*, 21 Gr. 534, and to some extent in this case, should be allowed to prevail when the statutory period of limitation has not intervened to bar the right to redeem; or whether the holder of a mortgage given in fact to secure the whole purchase money of the land, but purporting only to secure a bond debt, can insist upon treating the assignee of the equity of redemption, who is not shewn to have notice of the true consideration of the mortgage, as being merely the grantee of land which is subject to a vendor's lien.

I do not wish to intimate any dissent from the doctrine held by the learned Chancellor on these questions. I mention them merely for the purpose of saying that I have not formed and do not express an opinion one way or other.

On the ground that the Statute bars the plaintiff's equity of redemption, I am of opinion that the appeal should be dismissed with costs.

MOSS, J. A., and PROUDFOOT, V. C., concurred.

Appeal dismissed, with costs.

McMARTIN V. HURLBURT ET AL.

Exemption from seizure—Value of goods—Division Court bailiff—Notice of action—Jus tertii.

The defendants, Division Court bailiffs, were sued for selling under executions a horse which the plaintiff claimed as exempt under 23 Vic. c. 25.

The horse was sold for \$47.50; but the plaintiff swore that it was worth \$120, and the purchaser swore that he considered it worth \$90.

Held, reversing the judgment of the County Court, that the value of the horse was to be determined upon the whole evidence, and not only by the price it brought at the sale.

Held, also, following *Stephens v. Stapleton*, 40 U. C. R. 353, that the defendants were not entitled to a notice of action with the name and place of abode of the plaintiff endorsed thereon under C. S. U. C. c. 126, s. 10; a notice under section 193 of the Division Court Act being sufficient.

At the time of the seizure and sale, the horse was included in a chattel mortgage given by the plaintiff to one M.: *Held*, that the defendants could not set up the right of the mortgagee as a defence.

THIS was an appeal from the County Court of Northumberland and Durham, discharging a rule *nisi* which had been obtained by the defendants to set aside a verdict for the plaintiff.

The complaint was, that the defendants, who were respectively bailiffs of certain Division Courts, had seized and sold, under executions in their hands against the plaintiff, a gray horse of the value of \$60, which the plaintiff had desired to retain as exempt under the statute, 23 Vic. ch. 25.

The defendants pleaded not guilty by statute, referring to 22 Vic. ch. 19, secs. 193-4 and 8, and to C. S. U. C. ch. 126, secs. 1, 2, and 16.

It appeared that the horse in question was included in a chattel mortgage. No exemption was claimed by the plaintiff until the day of sale. The animal was sold for \$47.50 to one Sullivan, who bought it in for the plaintiff. The plaintiff swore that it was worth \$120, and that he would not have taken \$100 for it. Sullivan considered that it was worth \$90 and was offered that amount for it.

The learned Judge, who tried the case without a jury, found a verdict in favour of the plaintiff for \$60, and a rule *nisi* to enter a nonsuit or a verdict for the defendants was afterwards discharged.

The case was argued on the 25th June, 1877 (a).

J. D. Armour, Q. C., for the appellants. The notice of action was clearly bad in omitting to state the name and place of abode of the plaintiff, in accordance with C. S. U. C. c. 126, s. 10, which applies equally with C. S. U. C. ch. 19, sec. 193, to Division Court bailiffs; and the defendants are entitled to avail themselves of the cumulative protection of both Acts: *Armstrong v. Bowes*, 12 C. P. 539; *Pearson v. Ruttan*, 15 C. P. 79; *Moran v. Palmer*, 13 C. P. 528. Animals are not exempt from seizure under 23 Vic. ch. 25, sec. 4, sub-sec. 6, O.; but even if exempt, the horse in question was not, as the evidence shewed that it was worth more than \$60. The price it brought at the sale is no criterion of its value, as it is impossible to sell anything at such a sale for its real value; and the notice of the exemption claimed would be an additional obstacle in the way of its fair value being realized. Then, under the statute, the exemption must be claimed at the time of the seizure, but in this case no claim was made until the sale. Besides, the property in question was included in a chattel mortgage which contained no provision allowing the mortgagor to retain possession until default, and under such circumstances the mortgagee alone was entitled to bring an action therefor: *Leake v. Loveday*, 4 M. & G. 972; *Ruttan v. Beamish*, 10 C. P. 90; *McAulay v. Allen*, 20 C. P. 417.

H. Cameron, Q. C., for the respondent. It was held in *Stephens v. Stapleton*, recently decided in the Queen's Bench (a), that no endorsement at all is requisite upon a notice of action against a Division Court bailiff. *Davidson v. Reynolds*, 16 C. P. 140, is an express authority to shew that a horse is a chattel within the meaning of the Exemption Act; and it is not necessary to claim the exemption before the actual sale. The defendants were wrongdoers and cannot justify the seizure by shewing title in the mortgagee: *Great Western R. W. Co. v. McEwan*, 30 U. C. R. 559; *Brill v.*

(a) *Present*.—BURTON, PATTERSON, MOSS, J.J.A., and GALT, J.

(b) Since reported 40 U. C. R. 353.

Grand Trunk R. W. Co., 20 C. P. 440; *Mason v. Great Western R. W. Co.*, 31 U. C. R. 73. It cannot be contended here that the horse was worth more than \$60, as the price it sold for must be considered the true test of its value.

September 15th, 1877 (a). Moss, J. A., delivered the judgment of the Court.

On the argument in the Court below three grounds were urged for setting aside the verdict, and these have been renewed on the present appeal. Firstly, it is contended that the notice of action was insufficient, because the name and place of abode of the plaintiff were not endorsed in compliance with C. S. U. C. ch. 126, sec. 10, and the authorities decided upon that section. It is not disputed that the notice sufficiently complies with the requisites of sec. 193 of the Division Court Act, but it is argued that this section must be read in connection with ch. 126 (the Act for the protection of public officers); and that a bailiff of a Division Court is entitled to the cumulative protection of both Acts.

This precise point was very recently before the Court of Queen's Bench in *Stephens v. Stapleton*, 40 U. C. R. 353, and was decided adversely to the defendants' contention. We see no reason for differing from that decision.

As the learned Chief Justice points out, the reasoning upon which the Court of Common Pleas held in *McWhirter v. Corbett*, 4 C. P. 208, more than twenty years ago, that a sheriff is not entitled to notice of action before being sued for a wrongful seizure, is applicable to a Division Court bailiff. We are not disposed at this distance of time to scrutinize the reasoning upon which that judgment was founded, or to throw any doubt upon its correctness. We think, therefore, that the defendants received all the notice to which they were entitled, when the plaintiff complied with the requisites of the Division Court Act, and that this objection to the verdict fails.

It was urged in the second place that the plaintiff was not

(a) *Present*.—BURTON, PATTERSON, MOSS, J. A., and GALT, J.

the proper person to maintain this action, because the horse in question was included in a chattel mortgage which he had given to one Martin. We agree with the learned Judge of the County Court that this ground is wholly untenable. It is an attempt by one who, upon this branch of the case, is assumed to be a wrong-doer, to set up a naked *jus tertii* against the person in actual possession.

Mr. Armour ingeniously sought to withdraw the case from the operation of the well known rule on this subject by arguing that the plaintiff could not complain of the seizure, because it was lawful in its inception and continued to be lawful until the claim of exemption was made, nor of the sale, because the property was not his, but the mortgagee's.

This, however, does not really meet the point. So far as these defendants and their acts are concerned, the property was the plaintiff's. True it was subject to a mortgage, but a wrong-doer who had done an injury to this horse, or without any legal colour taken him from the plaintiff's possession, could not have sheltered himself under the rights of the mortgagee.

It seems impossible to suggest any solid ground upon which a bailiff, who sold this horse in violation of the plaintiff's privilege to have him exempt, can stand in any better position. Indeed it was the plaintiff's statutory right to retain this horse that the defendants invaded. By selling him they did not necessarily inflict any injury upon the mortgagee, for their action could not destroy his interest.

The third ground taken by the defendants was that the horse was not exempt, because it was shewn to have been of greater value than \$60. The horse was actually purchased at the sale by a person named Sullivan for \$47.75.

The learned Judge, in disposing of the rule *nisi*, held that this sum must, for the purposes of the case, be taken to be the value of the property. In this view of the law we are unable to agree. The defendants certainly could only be made liable for selling the horse if it was really worth no more than \$60. In the present investigation its value was to be determined upon the whole evidence, and not by an

exclusive reference to the price it brought at the bailiff's sale. This was one, but merely one, test of its value. All experience proves that it is by no means a highly satisfactory test. It is but seldom that articles put up at a bailiff's sale realize their fair price.

It would have been strange if this horse had brought its full value in the face of the plaintiff's protest against its sale. It was in fact bought in for the plaintiff's benefit by Sullivan, who promised to restore it on repayment of his purchase money. We are not indulging in mere conjecture when we infer that this was perfectly well understood by the persons present at the sale.

A far safer criterion is furnished by the other evidence of the value. The plaintiff can scarcely complain if the Court accepts his own estimate. He swore that in his opinion the animal was well worth \$120, and that he would not have taken \$100 for him. Sullivan, the purchaser, placed its value at \$90, and said that he was offered that sum for it. Such an offer surely furnished far more satisfactory evidence of its true value than the sum for which it was knocked down at the sale.

The plaintiff cannot complain because we attribute to him a sincere belief that the true value was at least \$100, as he has sworn. If that was his belief, he could not fairly or honestly have claimed that it was exempt.

We must assume that if the defendants, yielding to his protest, had refrained from selling, and an action had been brought against them by an execution creditor, who insisted that the horse was not exempt, he and his witness would have given the same evidence as to value. What would have been the result? That standard of value upon which the learned Judge relies could not have been appealed to, and the bailiffs would have been held liable because the horse was not exempt.

On this ground the appeal must be allowed with costs, and the rule made absolute to enter a verdict for the defendants.

Appeal allowed.

IN RE HARPER WILSON.

CARTER V. WOODRUFF.

Insolvent Act of 1875, sec. 84—Double proof.

W. carried on business separately and as a member of the firm of W. & S. The joint and several notes of W & S. and W. were given to secure debts due by the firm, and shortly afterwards both W. & S. and W. made assignments in insolvency.

Held, reversing the decision of the County Court Judge, that under section 84 of the Insolvent Act of 1875 the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of W., and (the partnership not having assumed this liability) against W.'s estate for the full amount of the debt.

The rule against double proof in such cases was abrogated by sec. 60 of the Insolvent Act of 1869, which contained the same provisions as section 84 of the Act of 1875.

Re Dodge & Budd 8 U. C. L. J. N. S. 51, commented on, but not followed.

Re Chaffey, 30 U. C. R. 64, distinguished.

This was an appeal from the County Court of the County of Lincoln.

The appellant, Carter, who carried on business as a builder, during the year 1875 performed work and supplied materials for the firm of Wilson and Smith, which was composed of Harper Wilson, George Wilson, and Edward W. Smith, and was engaged in the business of building and dealing in lumber. Harper Wilson carried on a separate business as a grocer in his own name, and for his own benefit. He was the financial manager of the firm of Wilson & Smith, and authorized to sign notes in the partnership name. In 1876 he gave the appellant the notes of the firm for the amount of their indebtedness, and at the appellant's request, and *for his better security*, he also signed his own name to some of the notes, thus making them the joint and several notes of the firm and of himself. On the 18th of May, 1876, the firm made an assignment under the Insolvent Act of 1875, and on the same day Harper Wilson made a similar assignment of his separate estate. The respondent was the assignee in insolvency of Harper Wilson. The appellant sought to prove against both estates, and having placed a value on the separate

liability of Harper Wilson, of 20 cents in the \$, he claimed to rank on the partnership estate for the remaining 80 cents in the \$, and in full on the separate estate of Harper Wilson. It was admitted that the estate of Harper Wilson would not pay more than 20 cents in the \$ of the debts individually contracted by him on account of his separate business.

The respondent, under the instructions of the inspectors of the estate of Harper Wilson, objected to the appellant's claim on the ground that it should have been made against the partnership estate, and should not become a claim against the separate estate until the individual creditors had been paid in full. This contestation having been brought before the learned Judge of the County Court, he decided that the appellant could not rank upon or receive any dividend from the individual estate until the separate creditors were paid in full; and that he would then only be entitled to receive a dividend on whatever balance of his claim might remain unpaid after deducting any amount which he might have received by way of dividend from the partnership estate; and he ordered the assignee not to pay the appellant any dividend on his claim until all the creditors to whom the insolvent was indebted on account of his grocery business had been paid in full, and that after payment of the claims of such creditors, the assignee should divide the balance among the appellant and all the remaining creditors of Harper Wilson, other than those whose claims were on account of his separate business, and that the dividend should only be upon the balance of their claims remaining unpaid after deducting any dividends they might have received from the estate of Wilson & Smith.

The plaintiff appealed.

The case was argued on the 24th of September, 1877, before Moss, J. A., sitting alone.

D'Alton McCarthy, Q. C., for the appellant.

Walter Cassels, for the respondent.

The following cases were referred to:—*Starey v. Barnes*, 7 East 435; *Alsager v. Currie*, 12 M. & W. 751; *Ex parte Wildman*, 1 Atk. 109; *Ex parte Bank of Scotland*, 2 Rose, 197; *Ex parte Veil & Co.*, 2 M. & A. 123; *Ex parte Farlie*, 1 Mont. 285; *Ex parte Bloxham*, 6 Ves. 449; *Ex parte English and American Bank*, L. R. 4 Ch. App. 50; *Rolfe and the Bank of Australasia v. Flower*, L. R. 1 P. C. 27-46; *In re Chaffey*, 30 U. C. R. 64; *Ex parte Honey*, L. R. 7 Eq. 178; *Ex parte Bevan*, 9 Ves. 223, 10 Ves. 107; *Goldsmid v. Cazenove*, 7 H. L. 785; *Ex parte Carne*, L. R. 3 Ch. App. 463; *In re Dodge & Budd*, 8 U. C. L. J. N. S. 51.

September 25, 1877. Moss, J. A.—The sole question presented for determination is, whether a debt, for which a firm is jointly and one of its members separately liable, can be admitted to double proof.

The learned Judge seems to have been of opinion that because Harper Wilson was merely a surety for the payment of this debt by the partnership, the appellant must be postponed to his ordinary creditors. I think there can be no doubt that in this view he has misapprehended the rights of the appellant. Indeed, it was not attempted to support the adjudication to its full extent, but the contention was limited to the ground that the appellant was not entitled to prove against both estates, and that he was bound to make his election whether he would rank as a joint or separate creditor. It is well known that the rule against double proof was firmly established in English bankruptcy law. Whatever doubts might have been entertained of its policy or soundness in principle, the judgment of the House of Lords in *Goldsmid v. Cazenove*, 7 H. L. C. 785, placed it upon the foundation of authority not to be shaken by any force less than legislative enactment. Its applicability to the colonies, where the domestic insolvent law did not unequivocally exclude its operation, was settled by the decision of the judicial committee of the Privy Council in *Rolfe v. Flower*, L. R. 1 P. C. 27.

In accordance with these authorities, it was held by the

Court of Queen's Bench of this Province, in *Re Chaffey* 30 U. C. R. 64, that under the Insolvency Act of 1864, a creditor must elect. If this case had arisen under the same Act, I should have felt myself bound by that decision; and therefore, the only question I am called upon to consider is, whether the Act of 1875 makes any difference in the creditor's position.

The solution of this question is to be found in the 84th section of the Act. Omitting the language which cannot possibly have any application to this case, it reads:—If there be more than one insolvent liable as partners, and the creditor holds the liability of one of them, as security for a debt of the firm, he shall specify the nature and amount of such liability in his claim, and shall therein on his oath put a specified value thereon; and the assignee, under the authority of the creditors, may either consent to the right to rank for such liability by the creditor at such specified value, or he may require from such creditor an assignment of such liability at an advance of ten per centum upon such specified value to be paid by him, &c.; and in either of such cases the difference between the value at which the liability is retained or assumed, and the amount of the claim of such creditor, shall be the amount for which he shall rank and vote as aforesaid.—Although the language used is not very felicitous, and the clause, as a whole, is made somewhat complicated by the provisions relating to security which I have omitted, it seems to me that its effect is perfectly clear. It precisely covers the very case now in appeal. Here there are more than one insolvent liable as partners, and the appealing creditor does hold the liability of one of them, as security for the debt of the firm. What then is the course he should take? Does the statute require him to elect? By no means. In imperative terms it directs him to state the nature and amount of this individual liability, and to put a specified value thereon. It then gives the insolvent's creditors the option either of allowing the proving creditor to retain the benefit of this liability, or of taking it for themselves at an advance

of ten per centum upon the specified value. Upon what does the Act contemplate that the proving creditor, on the one hand, and the general body of creditors on the other, shall found their estimate of value? Obviously upon the amount which can be realized upon it out of the separate estate of the individual partner. It thus intends that the creditor, if he is allowed to retain, or the general body of creditors through their assignee if they assume this claim, shall prove for the full amount against the separate estate. In no other way, that I am able to conjecture, can effect be given to the language of the statute. This appears to me to be the plain, natural, and sensible interpretation of the language used. Conforming, as I am bound to do, in the strictest manner to the test suggested in *Rolfe v. Flower*, I am of opinion that the Legislature has unequivocally manifested its intention to abrogate the rule against double proof, and has in fact prescribed the manner in which double proof is to be made. The appellant has accurately complied with the requirements of the statute. He has placed a value upon the separate liability of Harper Wilson. He has thus given the partnership creditors the option of assuming this claim for their own benefit at an ascertained price. They have not availed themselves of this right, because the value of Harper Wilson's estate did not make it to their advantage. He has, therefore, proved against the partnership estate for his claim, after deducting this specified value. The right to recover upon this individual liability has become his absolutely, and he is entitled to prove for the full amount of it upon the separate estate.

I do not think that the judgment in *Re Chaffey*, 30 U. C. R. 64, contains anything opposed to this construction of the statute. As I have already pointed out, the rights of the creditor were measured by the terms of the Act of 1864. That act did not contain the provisions under review, which were first introduced into the Act of 1869. The provisions, which were considered by the Court in *Re Chaffey*, are very different from that now in question. That difference did not escape the attention of the very learned Judge who delivered

the judgment of the Court, for he pointedly says:—"Notwithstanding anything in the Act of 1864, we are of opinion the appellants were not bound to value the security which they held by the endorsation of the separate creditor, and to deduct it from their claim. It does not come into consideration under that Act as it would if the Act of 1869, by the 60th Section, were held to apply."

But I confess my utter inability to distinguish the present case from *Re Dodge*, decided by Mr. Justice Ritchie in the Supreme Court of Nova Scotia, as reported in U. C. L. J. Vol 8, N. S. p. 51. The facts are substantially the same, and the decision proceeded upon a consideration of the Act of 1869, the provisions of which upon this topic are identical with those of the Act of 1875. I am, therefore, constrained either to decline to follow this judgment, or to disregard what I have stated to be, in my view, the proper construction of the Statute. It is conceded that the decision is not of binding force upon me, but I need scarcely say that I consider it entitled to the highest respect, and that I should only feel justified in dissenting from it upon reasons which appeared to me to be unanswerable. It is unnecessary for me to determine whether I should have felt it my duty to adhere to the construction I have placed on the 84th Section, if I had found that the learned Judge after a consideration of the 60th Section of the Act of 1869 had arrived at a different conclusion. I am relieved from any such necessity, because from a perusal of the judgment it seems manifest that the attention of the learned Judge was not directed to this section. He explains with great clearness and precision the English rule, and then proceeds: "The law being clearly established in England by these decisions, are our Courts to be governed by it in carrying out the provisions of our Insolvent Act? The rule in question is not one depending on legislation, but was established by English Judges on principles supposed to be applicable to distribution of insolvent estates, and it is as applicable to the Insolvent Act of 1869 as to the Bankrupt Acts of England, though it is not to be

found enacted in either; for the provisions of our Act *referred to on the argument*, do not seem to me to touch the question." He then shows that neither section 56, nor section 64, excludes the operation of the rule—an opinion in which I fully concur. But no reference is made to the sixtieth section, which alone does touch the question. His attention was confined to the sections which counsel had discussed in argument, and for the moment he, as well as they, overlooked the really material section. I venture to think that but for this oversight, a different conclusion would have been reached.

I therefore order and adjudge that the claimant is entitled to rank upon the estate of the said Harper Wilson for the full amount of his claim in respect of the promissory notes in question, and upon the partnership estate of the said Wilson & Smith for 80 cents in the dollar of such claim, and to receive dividends upon the amounts as proved *pari passu* with the joint and several creditors; and that the appellants and respondent's costs of this appeal, as well as the appellant's and respondent's costs in the Court below, be paid out of the separate estate of the said Harper Wilson.

Appeal allowed.

BILLINGTON V. PROVINCIAL INSURANCE COMPANY.

Insurance—Existing insurance—Notice to agent of—Interim receipt.

The plaintiff applied to effect an insurance in the defendants' company through one Suter, their local agent at Dundas, on certain machinery, for two months. In answer to the enquiry in the application respecting other insurances, he mentioned two existing policies, and informed Suter that there was another policy in the Gore Mutual, covering the building and machinery, but that he could not remember the amount which was on the machinery, and requested him to wait until he found the policy, as he was most anxious to have the correct amount stated in the application. Suter, however, through whom this policy had been effected as agent for the Gore Mutual, promised to ascertain the amount and fill it in before sending the application to the head office, whereupon the plaintiff signed it, and received an interim receipt which declared that unless followed by a policy within thirty days, the insurance should cease, and contained a foot note to the effect that any existing insurances must be notified at the issuing of the receipt, or the contract would be void. Suter forwarded the application, without having filled in the omitted particulars, to the board of directors at Toronto, by whom it was accepted; and in accordance with their practice where the risk only extended over a short period, instead of a formal policy, they issued a certificate which stated that the plaintiff was insured subject to all the conditions of defendants' policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. Suter had authority to receive applications, accept premiums and issue interim receipts. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy.

Held, reversing the decree of PROUDFOOT, V. C., 24 Gr. 299, PATTERSON, J. A., dissenting, that verbal notice to the agent was inoperative to bind the company; and that the plaintiff therefore was not entitled to have the policy reformed by the indorsement of the Gore Mutual policy thereon, and could not recover.

Held, also, that verbal notice to the agent of existing insurances was sufficient so far as the interim receipt was concerned.

Seemle, per Moss, C. J. The plaintiff should not be permitted to sue upon a policy as a perfect and complete instrument entitling him to certain rights, and in the same action to say that it does not contain the real contract which he has made.

This was an appeal from the decree of Proudfoot, V. C., reported 24 Gr. 299. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal. The case was argued on the 16th June, 1877 (a.)

(a) *Present*.—MOSS, C. J., BURTON and PATTERSON, JJ.A., BLAKE, V. C..

Boyd, Q. C., (with him *H. Murray*), for the appellants. The sole question for the determination of the Court is, whether the appellants had notice of the insurance in the Gore District Mutual Insurance Company; for unless they had such notice they are entitled to succeed in this appeal. The evidence shews that, although Suter knew that the respondent had an insurance of \$3,000 in the Gore, he was not aware that any part of it was on the stock; and it is submitted that an indefinite verbal notice of this nature cannot be held to bind the company. If, as asserted by the respondent, the agent promised to ascertain whether any part of this assurance covered the stock, and to make the application correct before forwarding it, he undertook to do something which was entirely beyond his powers as an agent of the company. Besides, it is expressly provided by the policy that, if an agent shall make the application for the insured, he shall be deemed the agent of the insured and not of the company. It was not shewn that the agent had any authority to receive notice of either existing or subsequent insurances; and at most the notice was merely verbal, which, under the authorities, is not sufficient. The respondent has no *locus standi* here at all if, as he swears, he never received the short form policy, for the interim receipt provides that unless it be followed by a policy within thirty days, the insurance shall be void. But if he did receive it, he is bound by all the conditions in the long form policy, as it recites an insurance subject to all the conditions in that policy. Having elected to sue on the long form policy, he is bound by all the conditions therein, one of which is, that the policy shall be void unless all previous insurances shall be endorsed or otherwise acknowledged by the company in writing; and this condition not having been complied with, the action on the policy must fail. The company cannot be held to have waived their rights by issuing the long form policy after notice of the insurance, as they were bound in accordance with the terms of certificate to issue a policy if required. They referred to *Hawke v. Niagara District Mutual Fire Ins. Co.*, 23

Gr. 139; *Billington v. Canadian Mutual Fire Ins. Co.*, 39 U. C. R. 433; *Weinaugh v. Provincial Ins. Co.*, 20 C. P. 405; *Williams v. Canada Farmers' Mutual Ins. Co.*, 27 C. P. 119; *Noad v. Provincial Ins. Co.*, 18 U. C. R. 584; *Shannon v. Gore Mutual Ins. Co.*, 37 U. C. R. 380; *Hendrickson v. Queen Ins. Co.*, 31 U. C. R. 547; *McBride v. Gore Mutual Ins. Co.*, 30 U. C. R. 451; *Merritt v. Niagara Mutual Ins. Co.*, 18 U. C. R. 529; *Mason v. Hartford Fire Ins. Co.*, 37 U. C. R. 437; *Dafoe v. Johnstown Mutual Ins. Co.*, 7 C. P. 55; *Ramsay Cloth Company v. Johnstown Mutual Ins. Co.*, 11 U. C. R. 516.

Osler, Q. C., (with him *C. Moss*), for the respondent. It is not pretended that the respondent was guilty of any attempt to conceal the insurance in question, as the evidence clearly shews that he was most anxious to have it mentioned in the application; and the case must, therefore, be considered in a different manner from those in which there has been fraud and collusion. The respondent swears that he told Suter to insert the full amount of the insurance, as being on the goods. Suter does not distinctly deny this, but merely says he does not recollect it; and under such circumstances the Court should hold the respondent's version to be the correct one: *Wright v. Rankin*, 18 Gr. 631. The agent was clearly the proper person to receive the notice. The interim receipt states that notice of existing insurances must be given at the time of the issuing of the receipt; it does not refer in any way to the conditions of the policy, and when nothing is said as to the mode in which a notice is to be given, the authorities shew that verbal notice is sufficient. At the time of the fire the contract of insurance was contained in the interim receipt, as the policy was not issued till after the fire, and the conditions therein cannot be held to apply so as to defeat the respondent's rights. The appellants waived their right, if any, to avoid the policy for non-compliance with the condition requiring the endorsement of this insurance on the policy or its acknowledgment in writing, by issuing the policy sued on after the loss, and

after written notice of the insurance had been given to them by the proof papers. At all events we are now entitled to ask to have the policy reformed by the insertion of the insurance of which the appellants had notice through their agent. They cited *Lowe v. Jackson*, 20 Beav. 189; *Wright v. Rankin*, 18 Gr. 631; *North British Ins. Co. v. Hallett*, 7 Jur. N. S. 1263; *Wing v. Harvey*, 5 DeG. M. & G. 265; *Wyld v. Liverpool Ins. Co.*, 23 Gr. 442; *McEwan v. Montgomery County Mutual Ins. Co.*, 5 Hill N. Y. 101; *Shannon v. Gore Mutual Ins. Co.*, 40 U. C. R. 198; *Hodgkins v. Montgomery County Mutual Ins. Co.*, 34 Barb. 213; *Rowley v. Empire Ins. Co.*, 36 N. Y. 550; *Sexton v. Montgomery County Mutual Ins. Co.*, 9 Barb. 194; *Patterson v. Royal Ins. Co.*, 14 Gr. 169; *The Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Gr. 418.

Boyd, Q. C., in reply. The Court has no power to reform the policy, as the evidence shews that neither the agent nor the respondent knew whether any of the Gore insurance was on the stock, and that they were to come together again; and under *Campbell v. Edwards*, 24 Gr. 173, a party seeking rectification must shew that there was another agreement assented to and concluded by both parties.

December, 17th, 1877 (a). Moss, C. J.—All the facts which in my judgment are material to the decision of this case, lie within a narrow compass, and are not open to serious controversy.

On the 6th of February, 1875, the plaintiff applied to the defendants through Robert W. Suter, their local agent at Dundas, to effect an insurance against loss by fire to the amount of \$6,000, for two months, on certain agricultural machinery in process of construction in a manufactory in Dundas. He signed the defendants' usual form of application, which contained a direct enquiry as to other insurances, and an express agreement on the part of the applicant that the application should form a part and be

(a) *Present*.—MOSS, C. J., BURTON and PATTERSON, JJ. A., BLAKE, V. C.

a condition of the insurance contract. Suter's authority extended to receiving applications for insurances, receiving premiums, and issuing interim receipts for policies. These receipts were sent to him by the defendants, in blank, and filled up by him as occasion required. Their form was that of an acknowledgment of the receipt of money as a premium for an insurance to the extent of a named sum upon property described in an application, subject however to the approval of the board of directors in Toronto, to whom power was reserved to cancel the contract at any time within 30 days from the date of the interim receipt, by mailing a notice. This receipt embodies, in express terms, a mutual agreement, that unless it be followed by a policy within the said 30 days, the contract of insurance shall wholly cease and determine, and all liability on the part of the defendants be at an end; and that the non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of the contract by the board of directors; and appropriate provision is made for returning the unearned part of the premium. Although Suter does not appear to have been specially authorized to receive and transmit notices of other insurances, he was in fact the medium through which such notices were generally forwarded to the company's head office.

In answer to the enquiry respecting other insurances, the application, as signed by the plaintiff, and transmitted to the head office by Suter, stated that there were two, viz.: one in the Hastings Mutual of \$2,000, and one in the Canadian Mutual of \$3,000. The plaintiff had in fact a policy with the Gore Mutual for \$3,000, which covered the property mentioned in the application to the extent of \$1,000. Suter was the agent of the Gore Mutual, through whom this insurance had been effected. The plaintiff's own explanation of the way in which all reference to this insurance was omitted from the application, may be thus summarized:—Suter came to his office to get the application filled up and signed on Saturday night, just before the

time for paying his workmen. They found the other policies, but not that of the Gore Mutual. It had been assigned to a Building Society, but according to the plaintiff's belief was still in his possession. The plaintiff spoke particularly of the insurance with the Gore Mutual, a part of which he thought to be on stock, but what part he did not know. As Suter did not know, the plaintiff said to him : "I want you to wait until the men are paid, and we will find the policy." He did not want that (application) sent. Suter said : "I have all the particulars over at the office" ; to which the plaintiff replied : "Write in, further insurance in the Gore for \$3,000." He says that he knew that was the insurance, and if defendants had a mind to take exception to it he did not care. Suter told him, "you can rest assured I will put that in before I send it off," or, as the plaintiff elsewhere puts it, that he wouldn't send it off until he saw him again. Plaintiff then signed the application and received the usual interim receipt. He did not see Suter again with reference to the matter until after the fire. He is very emphatic in his statement that he told Suter to put down the insurance in the Gore Mutual at \$3,000 ; and he gives as a reason for clearly recollecting this, that he knew that in the application it was a very important matter that all the particulars should be mentioned, and he did not want the application "to go out without having all that in, or all that he knew about it." He relied on Suter's promise to insert the statement that there was an insurance in the Gore Mutual for \$3,000, and this although he did not himself suppose that this property was covered to that extent.

The application was forwarded by Suter without any alteration or addition, and after some hesitation the board or the general manager decided to accept the risk ; but no person connected with the company except Suter had any knowledge of the existence of the policy in the Gore Mutual, nor does Suter appear to have made any further investigation. According to him, neither the plaintiff nor he knew whether the policy in the Gore covered the stock

It was not the practice of the defendants to issue for risks extending over so short a period as two months any formal policy, but a certificate stating that the person was insured under and subject to all conditions of the defendants' policies, of which the assured admits cognizance. To this certificate there is appended a foot note, that in the event of loss it will be replaced by a policy, if required. Within 30 days from the date of the application the defendants seem to have issued such a certificate in favour of the plaintiff. The fire happened after the expiration of the 30 days, but within the two months.

Curiously enough the plaintiff denies the receipt of any such document. If we were to accept this denial as conclusive, the plaintiff would probably be out of Court, for by the express terms of the interim receipt, the non-delivery of a policy (for which the certificate is only a substitute), within the specified time is absolute and incontrovertible evidence of the rejection of the application by the board of directors. The plaintiff's own statement, if treated as conclusive, would place him in a plain dilemma. He could not sue upon the interim receipt, because the loss occurred after the 30 days, during which, at most, it protected him. On the other hand, the continuance of the insurance was expressly made dependent upon the delivery to him of a policy, and his inability to produce one would have defeated any assertion of claim against the defendants. After the fire the defendants did issue a policy to the plaintiff in their usual form, and endorsed with their ordinary conditions, one of which is, that notices of all previous insurances shall be given to the defendants and endorsed on the policy, or otherwise acknowledged by them in writing, at or before the time of the making assurance therein, or otherwise the policy shall be of no effect. In the body of the policy is a promise that in case the assured shall have already any other insurance against loss by fire on the property, and not notified to the company, and mentioned in, or endorsed upon the policy, then the insurance shall be void and of no effect. The only

insurances mentioned in or endorsed upon the policy which the defendants issued to the plaintiff, were those in the Hastings Mutual and in the Canada Mutual.

The plaintiff commenced an action in the Court of Queen's Bench upon this policy, and declared in the usual way.

The defendants pleaded, with other pleas, the conditions to which I have referred. To this the plaintiff replied on equitable grounds, and also added a count to his declaration by which a reformation of the policy was sought. This count, after stating the terms of the policy as in the first count, alleges that at the time of effecting the insurance the plaintiff had an insurance in the Gore Mutual to the extent of \$1000, of which the defendants had notice before and at the time they effected the risk, and that with such knowledge they agreed to accept the risk and to insure the plaintiff's property, and to mention the other insurance in the policy or have it endorsed thereon; and that by mistake they omitted to do either, of which the plaintiff had no knowledge until after the loss; and that the policy ought to be reformed and amended by the mention therein of the existence of the policy in the Gore Mutual of \$1000. It then claims in effect that the policy should be treated as reformed, and the plaintiff be entitled to recover upon that footing. The defendants answered this count by two pleas. By the first they denied notice of the Gore Mutual policy, and the agreement to mention it in, or endorse it on, their policy, and the alleged mistake. The second plea set up the conditions previously referred to, and that the applicant shall be bound by his representations in making his insurance, and if the agent of the company makes the application for the insured, he shall be considered the agent of the insured, and not of the company; that the plaintiff made his application through Suter, the agent of the defendants at Dundas, and that the application was in writing, and was forwarded to the defendants at the head office in Toronto; and the defendants' policy now in question was issued thereon; that the application contained no statement or

mention of the policy of \$1000 in the Gore Mutual, nor had the defendants or their directors, or any of the officers of the company at the head office, any notice of such policy before the making of the application, or of the defendants' policy, although the plaintiff had communicated the existence of the said policy of \$1000 to Suter at the time he made his application, but Suter had no authority from the defendants to change or vary or waive the said conditions, and he did not give the defendants any notice thereof, and the defendants had no notice, unless the notice to Suter was notice to them, which they deny; that immediately after the application of the plaintiff, the defendants' policy was delivered to him, and he was aware and had the means of knowing that the policy of the plaintiff was not endorsed or otherwise authorized by the defendants in writing, and that he was guilty of laches in not seeking sooner to reform the policy; that the conditions in the policy were made expressly with the intention of preventing fraud and collusion between the insured and the agents of the company, by requiring the knowledge of the company to be evidenced in writing, and that if applications are made for insurances by an agent of the defendants, he shall be considered the agent of the insured and not of the defendants, as to the application; and that they are not bound by the notice to or knowledge of Suter, without their acknowledgment endorsed on the policy or otherwise expressed in writing; and that the policy of \$1000 was not omitted to be endorsed on the policy of the defendants, or otherwise acknowledged in writing, through any error or mistake of the defendants. Similar allegations are contained in the plaintiff's equitable replication to the 3rd plea to the 1st count, and the defendants' rejoinder thereto.

At first sight this record seems rather complicated and embarrassing, but I think there is no doubt that the substantial question to be determined is, whether the plaintiff has an equity to have the policy reformed. He cannot succeed if the policy remains in its present shape. Either the conditions as to giving notice of existing insurances must be

expunged, or the policy must be reformed and amended, as the added count puts it, by the mention therein of the existence of the policy in the Gore Mutual of \$1000. The former alternative is out of the question, for the defendants have an undoubted right to provide for the case of the insurances in the Hastings Mutual and the Canada Mutual. The case, then, is to be determined on precisely the same principles, as if the more correct and convenient course had been adopted of filing a bill for the rectification of the policy. It might, perhaps, be surmised, that the plaintiff would have sought relief in that mode and from the appropriate forum, if he had not clung to the hope that by suing at law he might obtain the advantage of the opinion of a jury.

The plaintiff's right to recover being dependent on his right to a reformation of the instrument, the question is, whether he can, consistently with the established doctrines of equity, obtain the relief.

I take it that the principles upon which the Court acts are clear and well defined. They have been amply illustrated and explained in modern cases; but they were long since enunciated with considerable precision. Before the Court will assume to rectify an instrument, it must be satisfied beyond all reasonable doubt that there was a common intention different from the expressed intention, and a common mistaken supposition that it was correctly expressed. It is essential that clear proof should be adduced of a real agreement between the parties different from the written agreement. If it appears that the instrument was executed under a common mistake as to its contents, but that no real agreement had ever been concluded between the parties, there may be rescission; but there is no foundation for rectification.

In order that a decree for reforming the instrument may be made, the plaintiff must prove not only that by mistake the written agreement does not correctly represent the real agreement, but that there was a mutual binding assent by him and the other party to a complete agreement.

Henkel v. Royal Exchange Assurance Co., 1 Ves. Sr. 317, which came before Lord Hardwicke in 1749, was a suit brought for the rectification of a policy on the ground that there was a mistake in stating the intention of the parties, which was, that the warranty should not have been so general, viz.: should take place from Ostend only, and not from London. The evidence on the part of the plaintiff were the depositions of one Knox, who seemed to support the plaintiff's view, and another person, whose account of the transaction was not precisely the same; although the report is silent as to the extent of the variance. His Lordship said:—"No doubt but this Court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to intent of the parties, on proper proof that would be rectified. But the plaintiff comes to do this in the harshest case that can happen: of a policy, after the event and loss happened, to vary the contract so as to turn the loss on the insurer, who otherwise, it is admitted, cannot be charged. However, if the case is so strong as to require it, the Court ought to do it. The first question is, whether it sufficiently appears to the Court that this policy, which is a contract in writing, has been framed contrary to the intent and *real agreement*." * * * "As to the first, it is certain, that to come at that there ought to be the strongest proof possible, for the agreement is twice reduced into writing in the same words, and must have the same construction; and yet the plaintiff seeks, contrary to both these, to vary them; and that in a case where the witnesses on the part of the plaintiff vary from each other."

In *Mackenzie v. Coulson*, L. R. 8 Eq. 368, a bill was filed by underwriters for rectification of a policy of marine insurance delivered to the defendants, so as to make it conformable to that which they alleged was the real contract. The defendants denied that they ever entered, or intended to enter, into any contract other than that ex-

pressed by the policy. Sir William James, V. C., held that there was no evidence of any other contract, and pronouncing judgment observed, p. 375:—"Courts of Equity do not rectify contracts; they may, and do, rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to shew that there was an actual concluded contract antecedent to the instrument which is sought to be rectified; and that such contract is inaccurately represented in the instrument. * * * It is impossible for this Court to rescind or alter a contract with reference to the terms of the negotiation which preceded it."

The judgment of Lord Chelmsford in *Fowler v. Fowler*, 4 DeG. & J. 264, is very valuable and instructive. He points out that while the power which the Court possesses of reforming written agreements where there has been an omission or insertion of stipulations contrary to the intention of the parties, and under a mutual mistake, is one which has been frequently and most usefully exercised, it is also one which should be used with extreme care and caution; and that to substitute a new agreement for one which the parties have deliberately subscribed, ought only to be permitted upon evidence of a different intention of the clearest and most satisfactory description. He refers to Lord Thurlow's opinion, that the evidence which goes to prove that the words taken down in writing were contrary to the concurrent intention of all parties must be strong, irrefragable evidence; and after intimating that the word "irrefragable" may require some qualification, he proceeds:—"It is clear that a person who seeks to rectify a deed upon the ground of mistake, must be required to establish in the clearest and most satisfactory manner, that the alleged intention, to which he desires it to be made conformable, continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought. For there is a material difference between setting aside an instrument and rectifying it

on the ground of mistake. In the latter case you can only act upon the mutual and concurrent intention of all parties for whom the Court is virtually making a new written agreement."

The rule seems to be very well expressed by Spencer, C.J., in *Lyman v. United Insurance Co.*, 17 Johns. 373; to which I refer, because its object was to have a policy of insurance amended after the loss. The learned Judge forcibly observed that it is not enough in cases of this kind to shew the sense and intention of one of the parties to the contract. It must be shewn incontrovertibly that the sense and intention of the other party concurred in it; in other words, it must be proved that they both understood the contract, as it is alleged it ought to have been, and as in part it was, but for the mistake. He adds, p. 376:—"If it be clearly shewn that the intention of one of the parties is mistaken and misrepresented by the written contract, that cannot avail, unless it further be shewn that the other party agreed to it in the same way, and that the intention of both of them was, by mistake, misrepresented by the written contract."

These authorities leave no room for uncertainty as to the principles upon which this remedial equity should be administered. Let us endeavour to apply them to the facts of this case. The plaintiff is bound to prove clearly that there was a real agreement between him and the defendants, different from that expressed in the policy. He must shew that there was a mutual assent to the terms which he says should be expressed in the policy. In order to succeed he must shew that there was an assent by the company to the insertion in the policy of the existence of the \$1000 insurance in the Gore Mutual; or to put it in the broadest and most liberal manner for the plaintiff, an agreement mutually assented to that he should be insured from the 6th of February to the 6th of April, notwithstanding the existence of this other insurance. Now, when did the company enter into such an agreement? How or by whom was their assent given to any such term? The

answer given is : By the agent, Suter. But this seems to me to rest on an entire misapprehension of his functions, either actual or assumed. He neither had, nor pretended to have, authority to give the company's assent to any contract of insurance for two months. He did not undertake, either expressly or impliedly, that the policy should be issued in a certain form, or embody certain terms, for he did not undertake that a policy should be issued at all. The plaintiff did not suppose that in what took place between him and Suter, the latter was binding the company to such a contract as that which he now seeks to enforce. He knew that Suter was not assuming to do more than to forward his application for the consideration of the board, and to insure him until he was advised of the result, or for thirty days at most. He was perfectly well aware that the proposal to which the board was asked to assent was his written application, and his own statement already quoted shews that he was fully alive to the importance of the application containing correct information as to existing insurances. Conceding that the evidence establishes, with sufficient clearness, that Suter had notice of the fact that the particular property in question was insured in the Gore Mutual, that does not advance the plaintiff's case. His knowledge of that fact would not create a contract of the company, which neither he nor the plaintiff supposed was then being made. Notice to him might reasonably and justly be treated as a notice to the company for the purposes of any contract, which he was then, as agent, making on behalf of the company, but I cannot perceive how it can impart a term into a contract which was not to be made through him, but which, to the knowledge of the plaintiff, was outside and beyond his functions.

Then if the assent was not given by Suter, it was never given, for it is clear that the authorities at the head office had no idea of the existence of the other insurance. If Suter did not, no one on behalf of the defendants did, agree to insure the plaintiff for two months, notwithstanding the other insurance. On the 19th February, when the board

agreed to insure the plaintiff for that period, they acted upon the written application, and upon it alone. It appears that it was after some hesitation they accepted the risk. The Court is not at liberty to assume that it would have been accepted, had the board been aware of the additional insurance.

Indeed this case appears to me to involve precisely the same considerations as led Sir John Stewart to refuse relief in *Fowler v. Scottish Equitable*, 28 L. J. Ch. 225. I believe the soundness of that decision has never been questioned, and its appositeness will justify a further reference to it, although it has been frequently mentioned in our reports. The plaintiffs applied to the London agent of the defendants to effect an insurance upon the life of a person named Haire, in whom they were interested. Haire was a merchant residing at Gibraltar, and in the course of his business was in the habit of visiting ports in Morocco and other ports on the Mediterranean and on the coasts of Africa and Asia. The plaintiffs alleged that they notified the London agent of these facts, and that they expressly stipulated with him that the policy proposed to be granted on the life of Haire should not be vitiated by his visiting such ports on certain conditions, which were only arranged after much discussion. Upon the faith of this agreement, and before any policy was actually issued, the plaintiffs paid the first premium. The policy, when issued, provided that if Haire should depart beyond the limits of Europe, it should be void; but upon it was endorsed a memorandum that Haire should be at liberty without license or extra premium to visit Tangiers or any other port within the Mediterranean; but that it was understood that he was not to reside out of Europe at any place in the Mediterranean beyond the period of three months, or to go into the interior of Asia or Africa.

It was alleged that the mistake was in the endorsement being limited to Tangiers and ports in the Mediterranean, instead of extending to any ports on the coasts of Africa and Asia. The Vice Chancellor pointed out that the course

of dealing, and the evidence in the cause shewed that whatever the general authority of Cook might have been as agent, what actually took place was that the agreement, which the plaintiff intended to make, was to have its force and legal effect from an instrument to be executed in Edinburgh. The London agent could negotiate the terms of a policy with any person desirous of effecting one with the society ; but the policy itself was an instrument to be made in Edinburgh, which was the head quarters of the society. The agreement, in the opinion of the Vice Chancellor, was made in plain and distinct terms, as the plaintiff contended. But the proposal in writing was by mistake made in different terms. The agent in London communicated this proposal with its erroneous terms. Upon this the Vice Chancellor proceeds to say :—" To that proposal, which was not the real agreement, the Edinburgh directors assented ; and what is sought to be reformed is the memorandum which was signed by the Edinburgh agent, and adopted by the board as that which constituted the agreement. That Edinburgh manager is now sought to be made to sign, under the decree of the Court, as having agreed to it, a certain stipulation of which he never heard. It seems quite enough to say that an agreement means that both contracting parties are of one mind. Here one of the contracting parties to the instrument which is now sought to be reformed, confessedly never heard of that which is said to be the real agreement. The result, upon the whole, is plain, that the agent in London agreed to something which he never communicated to his principals. The agent in London communicated that which was a mistaken proposal. The plaintiff, who made the agreement with the London agent, never intended to be bound by the stipulation which he himself framed in a mistaken form. The result is, that there is no agreement at all." He afterwards points out that the agreement sought to be rectified, is that which was made by the manager in Edinburgh, just as the instrument sought to be reformed here is the policy made by the head manager in Toronto. The paral-

lelism between the two cases is so plain, that commentary is superfluous.

Although I have not taken into consideration in arriving at a decision the mode of procedure followed in this case, I cannot help observing that it appears to me highly inconvenient and anomalous. The plaintiff sues upon a policy as a perfect and complete instrument, under which he is entitled to certain rights. Then in the same action he is permitted to say:—"That is all a mistake. The instrument on which I am suing is not the real contract, which is something else." Elastic as are our present rules of pleading, they ought not to be stretched to the length of sanctioning such a record. In the words of Wood, V. C.: "No single instance has been produced when a plaintiff bringing forward a document on which he founds his right has been allowed to say that the instrument which he himself produces to the Court, does not express the real agreement into which he has entered."

I venture to think that the principles which underlie the judgment I have formed in this case, are neither harsh nor unreasonable. It is the duty of Courts to give effect to the rights of Insurance Companies, as well as to protect the just interests of the assured. This is a mere truism, and perhaps on that account is in danger of sometimes being treated with neglect. It may be reasonable and proper to hold a company bound even by loose dealings with, or informal notices to, a local agent authorized to grant interim receipts, so far as may be necessary to support the interim assurance. The company has accredited him to the public as their representative for the purpose of making these temporary insurances, and for that purpose he may be fairly treated as the full equivalent of the company. But when a company has taken every precaution to limit his powers to that extent, when they do their best to secure correct statements in writing from applicants, when they endeavour to make it be understood that it is upon the faith of these statements, and not upon any conversations with or notices to their agent, they intend to

act—there seems to be no injustice or harshness in requiring applicants to use some degree of caution. If a company is to be held bound after a loss has occurred to alter a policy, which they deliberately issued in strict accordance with the terms of the written application, containing all the information their governing body had for the exercise of their judgment, simply because their local agent knew and did not communicate some material circumstance, it is almost equivalent to transferring to the agent the power of issuing the policy.

In other business transactions, men ordinarily scrutinize with care the terms of important contracts. In the case of insurance contracts, inattention seems to be the rule. No doubt this arises in some degree from the length and complexity frequently characterizing policies. But it is to be remembered that Courts of Equity demand reasonable vigilance. In the words of James, V. C., in *Mackenzie v. Coulson*, L. R. 8 Eq. 375: "Men must be careful if they wish to protect themselves; and it is not for this Court to relieve them from the consequences of their own carelessness."

I think the appeal should be allowed; but as the company incurred no risk after the 20th February, when the short-date policy was presumably received by the plaintiff, that there should be an order for the return to him of four-fifths of the premium; and as to costs, I think justice will be done by following the course taken in *Fowler's* case, and awarding none to either party.

BURTON, J. A.—I agree with the learned Chief Justice, that although the issues on this record are most inartificially framed, presenting claims of a wholly inconsistent character, the substantial question presented for determination is, whether a case has been made for a reformation of the contract; and giving full effect to the Vice Chancellor's view of the evidence, I am unable to discover any grounds upon which, according to the rules of equity, as I understand them, such relief can be granted.

Had the policy been executed and delivered to the

plaintiff and retained by him for any length of time before the fire, and he had under such circumstances brought an action upon it, it would have required evidence of the most conclusive and unquestionable character to warrant a Court of Equity in subsequently interfering. In the present case the policy was not delivered until after the fire ; but to give the plaintiff a *locus standi* at all, it must be assumed in his favour that a short-date receipt or certificate was issued within 30 days from the issue of the interim receipt. That short-date receipt entitled him to a policy from the company in their usual form containing the usual conditions, and based upon the written application which the directors had before them when determining whether to accept or reject the risk.

Taking the view most favourable for the plaintiff, and laying aside for the present any questions arising upon the pleadings or the necessity of reforming the contract, in what position was he to enforce his claim upon the short-date receipt at the time of the fire, had he elected to file a bill in equity instead of requiring the issue of a policy and proceeding upon it at law.

Suter, as agent of the company, had authority to do two things :

1st. To receive and forward to the board of directors for their acceptance or rejection, written applications for insurance.

2nd. To grant interim receipts insuring the applicant pending the consideration of that application, not extending, under any circumstances, beyond the period of 30 days.

Within these limits the company were liable upon his contracts as fully as if made under their Corporate Seal, and they would be subject to all the incidents attaching to contracts generally, and notice therefore to him would be notice to them as far as that interim contract was concerned.

I take it also to be clear that within the same limits a verbal notice to the agent of existing assurances would have been sufficient, the *nota bene*, at the foot of the interim or provisional receipt, which

is the only portion of *that* contract which renders it necessary to take any notice of other insurances, not requiring the notice to be in writing. But for this N. B., no notice of other insurances would, as regards the interim insurances, have been necessary at all; and one can see a reason therefore for its being thus pointedly called to the attention of the applicant, whilst the dispensing with the necessity of a written notice to the agent is apparent, as the information was merely to enable him to judge whether he should entertain the application or reject it.

This, however, is the only condition applying to the provisional insurance; with that exception it is an absolute and unconditional contract; but that contract was subject to cancellation at any time by the board of directors, by causing a notice to that effect to be mailed to the applicant; and unless a policy were issued upon the application to be forwarded to the directors for their approval within thirty days, the provisional contract ceased and determined.

But the plaintiff was aware that the agent's power to bind the company was limited to a provisional contract of this kind, and that the ultimate contract of insurance depended upon the view which the directors might take of the risk founded upon the information contained in his written application. He was aware that the directors attached importance to the full disclosure of other insurances, for his attention had been called to it in the foot note to his receipt, and was himself under the belief that such disclosure was material, as is evidenced by his anxiety to have it inserted in the application. Whether it was in fact material must depend upon the contract itself which was entered into.

It is expressly agreed that the application shall form part, and be a condition of the contract of insurance.

In that application the enquiry is made, what insurance is effected on the property now to be insured, and with what companies. To this the applicant replies, "Hastings Mutual, \$2,000; Canadian Mutual, \$3,000; saying nothing of that in the Gore.

This is forwarded to the board of directors, and is in fact the only information before them, when called upon to form their opinion upon the risk. The directors accepted the risk, but as was their practice with short-date policies, instead of issuing a formal policy, granted a certificate to the effect that the plaintiff had insured under, and subject to all the conditions of the defendants' policies, of which the plaintiff admits cognizance, the property in question.

The policies issued by the company contain a proviso, that in case the assured shall have already any other insurance upon the property not notified to this company and endorsed on this policy, the insurance shall be void; and a covenant that the representation given in the application contains a just, full, and true exposition of all the facts and circumstances in regard to the risk, and to the condition, situation, and value of the property and the interest of the assured thereon, and if the same be not truly represented, the policy shall be void.

The 6th condition requires that notice of all previous assurance shall be given to the company and endorsed on the policy, or otherwise acknowledged by the company in writing, otherwise the policy will be of no effect.

The 19th condition requires that all notices required for any purpose must be in writing..

The issuing of the policy by the company with notice of any existing insurance must of course be regarded as an assent to such additional insurance, and they could be compelled, in the event of their refusal, to endorse it on the policy, as required by the conditions; and the same effect must be given to the certificate. But the question still remains, what was the contract effected by this proposal and acceptance. Can it be any thing more than this: We have accepted the risk offered upon the premises, and agree to insure them for the time specified, provided the facts and circumstances in regard to the risk, and the condition, situation, and value of the property, be as represented in the application, and that the insurances which you have

notified us of in that application are the only other insurances existing upon it ; and we will, if you require it, issue you a policy containing similar stipulations.

That it was the intention of the company that all such notifications should be made to the head office in writing, is manifest, I think, not only from the fact of their making a specific enquiry as to such further insurances in the application, but also from the proviso near the foot of the policy, which, after referring to the 6th condition, further provides that if any additional insurance be effected on the property, the assured shall at once give notice to the head office and have it endorsed or a certificate of consent given.

They appear to have endeavored to guard against any misapprehension or mistake by providing that the information upon which the directors were to act should be in writing, and in guarding in the body and conditions of the policy against being bound by notices given to agents except only in the case of the provisional receipt. If they have failed to accomplish this object, it is in consequence of the insufficiency of the language used to convey their meaning, and to my mind they have sufficiently expressed it, and all parties, I think, clearly understood that the application was the basis and the only basis upon which the plaintiff proposed for insurance, and by which alone the directors intended to be bound. That and its acceptance alone constituted the contract, and the sooner people learn that this is the mode in which these insurances are effected, and that their effect is not to depend upon loose conversations with agents, in my opinion, the better.

I am quite unable to concur in the view that the company can be prejudiced because they issued the policy after receiving the proof of loss in which this additional policy was referred to. They were bound in accordance with the certificate they had granted to issue a policy ; but they were not bound to endorse upon it the fact of another insurance existing of which they had not been notified.

I am of opinion, therefore, that if this were a bill filed

upon the short date certificate to enforce payment of the insurance money, the plaintiff must have failed, as he must fail now in seeking to reform this policy, because he establishes no such contract as alleged, and there is nothing therefore to reform it by.

I am of opinion, therefore, that the appeal should be allowed.

PATTERSON, J. A.—This action was begun in the Court of Queen's Bench. The plaintiff sued upon a policy of the defendants. It appeared that he could not get on at law upon the policy as it stood, unless under the equitable powers recently conferred on the Court of law; and an order was made in Chambers under the Administration of Justice Act, 1873, transferring the cause to the Court of Chancery. The appeal is from a judgment pronounced by Vice Chancellor Proudfoot. We are now dealing with a suit in equity, not one in a Court of law.

I do not think any particular reference to the pleadings is important. They probably raise directly enough the question to be discussed; but it appears from the judgment of the learned Vice Chancellor that the parties were to amend if necessary; and there is no reason to doubt that all the evidence was given which either party had to give.

The application was dated 6th February, 1875, and was for insurance on agricultural machinery in process of construction, but not on the building which contained it. In answer to the question, "What insurance is effected on the property now to be insured, and with what companies," two existing policies were mentioned; but a third, which was in the Gore District Mutual Company, was omitted.

This omission was not by any oversight of the plaintiff; but it happened that the policy was not in the plaintiff's hands, having been assigned to a building society; and although the amount of the policy, viz., \$3000, was known both to the plaintiff and to Mr. Suter, the agent of the defendants, they did not know how much of it was on the

goods and how much on the building. According to Suter's evidence they were not certain that any part of it was on the goods. The whole contest before us relates to this policy and the effect of what took place between the plaintiff and Suter as satisfying¹ the requirements of the insurance contract respecting notice of existing insurances. Three witnesses speak of what occurred, viz., the plaintiff, Mr. Suter, and a Mr. Ferrier. Suter was the defendants' agent at Dundas. The plaintiff's application was made through him, and in fact the blanks in the printed form were filled up by him. This was done in the plaintiff's office. Suter was also agent for the Gore District Company, and had effected the policy in that company. The accounts given by the three witnesses do not substantially differ. The learned Vice Chancellor does not, in his judgment, find the facts. He quotes from the evidence of each witness, and treats the facts as sufficiently apparent from those extracts. It seems quite clear that the plaintiff was anxious to have the Gore District policy inserted in the application, and that Suter spoke of having some memorandum at his office which would enable him to state the particulars of it. The plaintiff says that he wished Suter to insert the whole \$3,000 as being on the goods. He is not corroborated in this by Ferrier. Suter says he remembers nothing of the sort. It is not easy to understand why it was not done if the plaintiff wanted it done. And it is not to be assumed that, if it had been done, it would not have furnished fully as formidable a defence as has been supplied by the omission of it; because if the risk had been accepted on that basis, we should not have been surprised to hear the defendants complain of having been misled in their estimate of the amount of contribution from the other companies; the Gore District Company's policy being for only \$1,000 on the goods, and \$2,000 on the building. I do not believe that the plaintiff asked to have the \$3,000 inserted. I think, however, he relied on Suter doing something. I am satisfied from the evidence of the plaintiff and of Ferrier, who corroborates him in this particular, that he depended upon Suter

inserting the particulars of the policy if he found a note of them, and that Suter gave him to understand he would do so.

It is not so clear that he authorized Suter to forward the application or to treat it as a completed application for any purpose, without the insertion of the omitted particulars. The plaintiff's own account of it is: "I said, 'I want you to wait till the men are paid, and we will find the policy,' I did not want that sent. * * He said, 'I have all the particulars in my office, and you can rest assured I will put that in before I send it off.'" On cross-examination he slightly varies this. His words then were: "He said, 'I have the particulars over at the office, and I will assure you that I won't send this away before I see you again.'" It appears that Suter had only a note of the gross amount of the Gore District Company's policy and not of the particulars, and he sent away the application as it was.

The essential result of all this seems to be, that Suter had verbal notice from the plaintiff that some part of the \$3,000, for which Suter already knew the plaintiff held the policy, was an insurance on the goods; but he had no notice of what amount was on the goods; and except from the verbal intimation of the plaintiff, he had no knowledge that any part of it was on the goods. I am not overlooking that part of Ferrier's evidence where he speaks of Suter saying that he had *the divisions* in his office, and that *they* said they thought part was on stock. I cannot take this evidence as shewing that Suter said that part was on stock, because the plaintiff himself does not say so, and does not say that Suter knew any such thing; Suter denies it; and Ferrier himself farther on in his evidence answers thus: *Qu.* What did they say about the Gore Mutual Policy? *Ans.* I do not know the exact words they said. They wanted to get it, to get the terms put in the application. *Qu.* Was there anything said as to what it was on? *Ans.* I would not be positive about that; I cannot remember the exact words they used in talking about it. *Qu.* And you cannot remember whether anything was said as to what it was on, do you? *Ans.* I do not recollect.

Suter gave the plaintiff an interim receipt for the premium. This was given at the plaintiff's office on the occasion of his signing the application, as appears from the plaintiff's own evidence, and therefore when he was aware that the blank was unfilled, but trusted to Suter filling it before sending off the application, or retaining it until he saw him again. The premium was not actually paid when the receipt was given. It does not appear when it was paid, nor indeed is it expressly shewn that it ever was paid. The plaintiff says that he gave a note or an I O U for it, and assumes that his bookkeeper paid it. The bookkeeper speaks of a note for \$95.82, which included something besides this premium, which was \$54: but he cannot say how long the note had to run. As far as the evidence informs us, the premium, if it ever was paid, may not have been paid till after the fire. No point has been made as to this, and I suppose that for our present purpose we must assume it was paid, as the receipt purports, at the time the receipt was given. It is further shewn by the plaintiff that he had had experience in effecting insurances, and knew it was necessary to mention in the application the existing insurances on the property. The interim receipt was burned when the fire occurred. It was on a printed form supplied by the defendants, and which reads as follows:—

PROVINCIAL INSURANCE COMPANY OF CANADA.

HEAD OFFICE : TORONTO.

AGENT'S OFFICE, 187 .

Provisional Receipt No.

Received from of Post Office the sum
of dollars, being the premium for an insurance to
the extent of dollars on the property described in
 application of this date, numbered subject, how-
ever, to the approval of the Board of Directors in Toronto,
who shall have power to cancel this contract at any time
within thirty days from this date, by causing a notice to
that effect to be mailed to the applicant at the above post
office; and it is hereby mutually agreed that unless this
receipt be followed by a policy within the said thirty days

from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the Company shall be at an end. The non-delivery of a policy within the time specified is to be taken, with or without notice, as absolute and incontrovertible evidence of the rejection of this contract of insurance by the said Board of Directors. In either event the premium will be returned on application to the Local Agent issuing this receipt, less the proportion chargeable for the time which the said property was insured.

Agent.

N. B.—Any existing assurance on the property must be notified at the issuing of this receipt, or the contract is void. Please read this receipt in order to make yourself acquainted with its terms.

The insurance was only for two months.

It is shown that it is not the practice of the defendants to issue ordinary policies for insurances for short periods. Instead of this they give a certificate to the effect that the assured "have insured under, and subject to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance," and mentioning the particulars of the insurance. A note is appended, stating that the certificate will, in the event of loss, be replaced by a policy if required.

The fire occurred on 22nd March, more than thirty days after the date of the interim receipt, so that no claim could have been supported by that receipt. A short-date certificate had been issued on 19th February; but if the plaintiff's opinion is correct that he never received it, it must have miscarried on its way to him. After the fire the policy was issued on which the plaintiff declared in this action.

The contest is, whether a sufficient notice was given by the plaintiff of the insurance in the Gore District Company.

The policy has two stipulations on the subject, which are not quite alike. In the body of the policy is the proviso, "that in case the assured shall have already any other insurance against loss by fire on the property hereby insured, and not notified to this company, *and mentioned*

in or endorsed upon this policy, then this insurance shall be void and of no effect." And part of the 6th condition endorsed on the policy is, that "notice of all previous assurances upon property assured by the company shall be given to them, *and endorsed on this policy or otherwise acknowledged by the company in writing*, at, or before the time of their making assurance thereon; otherwise the policy subscribed by this company shall be of no effect."

There was no mention of the Gore District Company insurance inserted in the policy or endorsed upon it. This created the obstacle to the plaintiff's recovery, which, at law, he found insuperable.

The reformation of the policy, if the plaintiff is entitled to have it reformed, would be a useless form, as he does not require to return to the Court of law to seek his remedy there.

The important question is, was the plaintiff, when the loss was sustained, and before the policy issued, in a position to assert in a Court of equity that he had done all that was required of him, and that he was then insured under a valid and subsisting contract.

This case has certainly some peculiar features which, as the learned Vice Chancellor has pointed out, make an apparent case of hardship if the plaintiff cannot recover. There is no pretence of fraud, concealment or collusion; there was the greatest anxiety on the plaintiff's part to have the previous insurance inserted in the application; we may take what he says to be true, that Suter promised to insert it; I find no difficulty in believing that the plaintiff relied upon Suter doing so; and undoubtedly the plaintiff believed it was necessary to the validity of his insurance that the entry should be made. The observation must be added that if the plaintiff's diligence had only kept pace with his knowledge and his anxiety, the present litigation would not have arisen. We hear of no communication between the plaintiff and Suter or any officer of the company from the time when Suter left the plaintiff's office on the evening of Saturday, 6th February, till after the fire,

When Suter left the office on that evening, the application was, to the plaintiff's apprehension, incomplete. From the plaintiff's statements in evidence, one of two things was to be done. Suter was to supply the missing information if he could find it; otherwise he was to retain the application till he saw the plaintiff again. By the terms of the receipt which the plaintiff held, the interim insurance ceased at the end of a month in case he did not receive a policy. He says he did not receive the short-date certificate. Yet we do not find that his anxiety prompted him to inquire what Suter had done—whether he had filled in the blank or retained the application—whether a policy was to come or not; and when, after the month had passed, and the interim insurance had by its terms expired; and, in his ignorance of the issue of the short-date policy, he must, if he thought of the matter at all, have supposed he was uninsured, even that position fails to excite his interest or to lead to any enquiry.

The hardship, therefore, which unavoidably attaches to a loss by fire for which the party fails to recover an indemnity from the insurance company, is not one which in this case would necessarily entitle the plaintiff to very much sympathy.

On the other hand we must not fail to note that when the directors of the defendants' company issued the certificate, they were in ignorance of a material fact. The fact is made material by requiring in the form of application that the information shall be given, and the plaintiff is not in any way misled, and is under no misapprehension whatever as to what is required.

Speaking of the application as it actually went forward, Suter says in his evidence, "Mr. Harvey at first did not wish to carry this large sum, and I wrote him and urged him to do it, and he consented afterwards to do it." Whether the consent would have been given had the officer who gave it known there was another insurance of \$1,000, *a fortiori* if it had been called \$3,000, may be considered at least doubtful. If the defendants are bound by the know-

ledge of their agent under the circumstances of this case, as I think they are, it is important to understand the principle on which that result depends.

It cannot in this case be by estoppel or on any analogous ground. Many of the numerous decisions, principally in Courts of the United States, in which insurance companies have been held bound by the acts or the knowledge of their agents have rested upon this ground. This is pointed out by Miller, J., in his judgment in *Union Mutual Ins. Co. v. Wilkinson*, 13 Wallace 222, where he is reported to have said: "It is in precisely such cases as this that Courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is, that where one party has, by his representation or his conduct, induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a Court of Justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by Courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim." I do not understand the learned Judge, whose language is here given to use the words "equitable estoppel" as meaning anything different from estoppel *in pais*, his definition of which is very similar to that of Lord Denman in the leading case of *Pickard v. Sears*, 6 A. & E. 475.

The present plaintiff was not induced by any conduct or representation to believe in any state of facts which the defendants now deny. He had no misconception of the agent's authority. He did not rely on any act which the agent did, or on the supposed sufficiency of any communication which he made to the agent. Whether the intimation he made to the agent respecting the existing policy is or is not held to be sufficient as notice to the defendants, it is perfectly certain from the plaintiff's own mouth that

he did not think it was sufficient, and did not rely on its sufficiency, and that nothing was either said or done by the agent to induce him to rely upon it. He shews that he had no idea it was sufficient; such an idea was never suggested to him; but he understood that the application had to be completed, and depended on that being done. He relied, not on the existing state of facts, but on something yet to be done.

The plaintiff's rights must therefore depend, not on any estoppel, but on the effect of what was done as a matter of contract.

On this branch of the enquiry, I have had great fluctuation of opinion. I am yet by no means free from doubt, and my distrust of the judgment I have formed is naturally increased by my respect for the opinions of my learned brothers from whom I feel myself compelled to differ.

I do not disguise from myself the force of the considerations which tell against the plaintiff. The intention obvious from the interim receipt, that the ultimate acceptance of the risk was to rest with the directors at Toronto, the agent insuring only ad interim, and at farthest for thirty days; the question respecting insurances contained in the form of application; and the provision of the policy requiring the endorsement or acknowledgment in writing seemed to furnish reasons fully as strong as those which prevailed in *Hendrickson v. The Queen Ins. Co.*, 30 U. C. R. 108, 31 U. C. R. 547, for holding that the verbal notice to the agent was inoperative. I do not question the propriety of the decision in that case. I think it was properly decided. And being a decision of this Court it is, at all events, binding upon us. But I think the present case is distinguishable.

No promise by Suter to insert in the application or to communicate to the directors the notice of the Gore District Company's policy can help the plaintiff, for Suter could not bind the company by a promise; and we could not say that even if he had forwarded the information, the directors ought to have accepted the risk, because by the contract the discretion lay with them. If the company

were not bound by the information as given to Suter, the result would be that the contract evidenced by the short-date policy should be declared never to have been binding, as in *Fowler v. Scottish Equitable*, 4 Jur. N. S., 1169. It appeared to me that reasons of considerable weight existed for holding that to be the true result of the facts before us; but after anxiously considering all the data from which, in my judgment, we are to deduce the contract, I cannot see that the defendants can insist upon more than what was done by the plaintiff.

I see no ground which commends itself to me as tenable for holding that the insurance effected by an interim receipt, such as the one before us, and that evidenced by a policy afterwards issued, are two contracts. I think it is one contract of insurance, evidenced in the first place by the receipt and continued by the policy. It is all the contract of the company, not the successive contracts of the local agent and the board of directors. By the terms of the receipt the insurance ends after thirty days, unless in the meantime a policy issues. If a policy issues say in fifteen days, are there two insurances in force for the next fifteen? There is no provision that the insurance effected by the receipt shall cease on the issue of a policy. It is provided that the directors may cancel the contract at any time within thirty days. The issue of a policy certainly does not cancel it. The contract continues—not two contracts, one under the receipt and one under the policy—but the one contract, the one insurance, dating from the date of the receipt.

If the insurance under the receipt was valid, it must have been valid also under the policy, unless there is something in the terms in which the parties dealt, some condition subsequent, to defeat it.

Inquiring what were these terms, and pursuing the reasoning which has led to my conclusion, I treat the terms and conditions of the policy in use by the company as having been always in the knowledge and contemplation of the parties. It may not be quite fair to the plaintiff to do so, but having regard to the peculiar features of the

case, he should not succeed unless the performance of his side of the bargain will bear the most rigid scrutiny.

The form of the application contains, it is true, the question "What insurance is effected on the property now to be insured;" and it contains also the express agreement that the application shall form part of, and be a condition of the insurance contract; but it does not declare that the failure to state fully in that particular document the facts inquired into shall avoid the insurance. Turning to the policy itself, we find the covenant that the representation given in the application contains a just, full, and true exposition of all the facts and circumstances in regard to the risk, and the condition, situation, and value of the property insured, and the interest of the assured therein, so far as the same are known to the assured. These terms do not include insurances, and are not intended to do so, as is shown by the separate provision which I have already quoted as to existing insurances, and a similar stipulation respecting subsequent ones.

Thus the omission to notice the existing policy in the application is not of itself fatal. Undoubtedly there must be notice given of the insurance. The reasonable import of the form of application and the express provision of the policy agree in that, but do not, to my apprehension, make it indispensable that that notice should be contained in the application paper.

In entire consistency with this, we find the N.B. at the foot of the interim receipt: "Any existing assurance on the property must be notified at the issuing of the receipt, or the contract is void." This is the only express direction on the subject; and it is the direction which the company have thought proper to give for the guidance of the persons applying for insurance.

It is obvious that the agent issuing the receipt, was the person to receive the notice required by the N.B. It is equally clear that the notice was not to be in anticipation of a formal application yet to be made, because the interim receipt refers to the application as an existing document.

The warning is not that the contract is void unless the existing insurance is mentioned in the application ; and no reason is given why one question should be singled out from the application paper for the purpose of insisting that the answer to it must by no means be omitted from that document.

The warning does not, nor does the policy, require that the notice shall be in writing, and we cannot add such a term to the contract.

The agent had verbal notice that there was an insurance, the amount of which the plaintiff could not, at the moment, state, but which he emphatically insisted on as one to be taken notice of. I cannot say this was not notice of the existing insurance. If what is proved to have been said about it had been written on the face of the application, it would have been out of the question to urge that the want of more particular information made the notice of no avail. It would have been there to be acted on or remitted for further particulars as the company chose.

It therefore seems to me indisputable, that notice of the existing insurance was given to the agent, the proper person to receive it, at the date of the issuing of the interim receipt, and that the validity of the thirty days' interim insurance was not open to question.

If the company had then done what the receipt intimated was the routine, and either declined the risk or issued a policy, the matter would have been simple. The first case would speak for itself. In the second, the plaintiff would have had notice that the continuance of the insurance from thenceforth depended, not on the notice alone, but on a further act, namely, the mention in or endorsement on the policy, which was at once the stipulated evidence of receipt of the notice and of the company's assent to the double insurance. If the company had, in such a case, refused to mention or endorse the notice, that would, I apprehend, have been equivalent to a rejection of the risk.

But instead of issuing a policy, the company, for their own convenience, issued the short-date certificate, which appears to have miscarried on its way to the plaintiff.

Reverting for a moment to a circumstance to which I have already alluded, viz., the absence from the interim receipt of any provision for the contract effected by it ceasing, except in one of two events, viz., the rejection of the risk or the lapse of the thirty days, a curious phase of the present dispute would have been presented if the fire had happened within the thirty days, but after the issuing of the certificate. To say that the insurance under the receipt, the original validity of which I do not understand to be denied, had ceased by reason of the issue of the certificate, would be in effect saying that the certificate which professed to continue the insurance really annulled it; and yet without such an assumption we must have either two concurrent contracts, which it will scarcely be contended was the case, or the one contract, initiated by the receipt and taken up and continued by the certificate, subject of course to whatever conditions or modifications the certificate imported into it.

Now the only modification was, that the contract was to be "subject to all the conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance." None of the conditions endorsed on the policies, and which may be called the conditions proper, come in question. The policy contains the provision that the conditions are only to be resorted to in cases not therein otherwise specially provided for. The case of double insurances is specially provided for in the body of the policy; and the endorsed condition, which, as I have noticed above, differs from the provision in the policy, is therefore excluded—leaving us to read the words "conditions of the policy," as used in the certificate as meaning "provisions of the policy," in whatever part of the policy the provision may occur.

The provision in the policy requires two things, viz., that the other insurance shall be (1) "notified to this company, and (2) mentioned in or endorsed on this policy."

The endorsement on *this policy*, that is to say, on a policy which had no existence, but for which the company, for

their own convenience, substituted the certificate, plainly cannot have been essential to the validity of the insurance under the certificate.

The "conditions" imported into the certificate must be held to have been those only which were applicable to that mode of insurance—or, to give their literal meaning to the words "*all* the conditions," the stipulation was only that the endorsement was essential when there was a policy to endorse.

It is almost superfluous to remark that the certificate could not have been called a policy for the purpose of bringing the claim into operation, even if on its face it had not recognized the distinction by providing that a policy might issue after a fire if required.

For these reasons I have found myself unable to resist the conclusion that when the fire occurred, the plaintiff was insured under a valid contract, and was entitled in equity to recover his indemnity.

This is all that is necessary to sustain the plaintiff's decree. If, however, it was essential that he should have a policy, the only reasonable construction which, in my opinion, could be put upon the memorandum at the foot of the certificate, is, not that the company after the fire could force on him a policy with conditions which had never been applicable during the life of the risk, but that they were bound to give him such an instrument as should enable him to assert at law the rights which he at the moment had, though then only cognizable in equity.

I think the appeal should be dismissed, with costs.

BLAKE, V. C.—The evidence is not satisfactory to my mind, in support of the allegation of notice to the agent, of the insurance in the Gore District Mutual Insurance Company. In the Court below the testimony given was considered sufficient to support this finding, which must be taken in appeal as the true conclusion from the evidence. I think a verbal notice to the agent, such as that her found to have been given, is sufficient on an application

for the usual interim receipt. This receipt, however, only binds for 30 days from its date. As the fire took place after the expiration of the 30 days, the plaintiff can have no claim thereunder. He is therefore obliged to base his claim to recover either on the short-date or usual policy. It then became a dealing between the plaintiff and the company. The short form of policy was issued "subject to all conditions of the policies of the Provincial Insurance Company of Canada, of which the assured admits cognizance." Looking at the application and looking at clauses 6 and 19 of the conditions on the policy, it is clear that it was intended that the information as to prior insurances should be in writing. The power of the agent ended in the matter with the dealing on the footing of the certificate. Then comes the contract between the plaintiff and the company, represented by the short-form policy; this required the notice in writing which was not given, and I therefore think the plaintiff is disentitled to succeed. I coincide in the view taken by the Chief Justice of the Court, as to the disposition of the costs of the litigation.

Appeal allowed.

STANDLY V. PERRY ET AL.

Accretions—Highway—Wharf.

By 10 Geo. IV. ch. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to erect all such needful wharves, buildings, &c., as should be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering, lying, loading and unloading within the same, and to alter, repair, and enlarge the same as might be expedient.

The plaintiff's land extended to the water's edge and fronted on a public highway, at the end of which the company constructed a pier originally of thirty feet in width. From time to time earth dredged from the basin was deposited to the east of this pier, and crib work was placed on the outside to prevent it from being washed away. On the additional land thus formed partly by accretion and partly by the action of those representing the company, the defendants, in whom the powers conferred on the Harbour Company had been vested, built a storehouse, and a fence dividing it from that part of the plaintiff's land which had accrued to him from alluvial deposits, whereupon the plaintiff filed a bill to compel their removal, on the ground that they were on the highway and prevented him from having access thereto from his land.

Held, reversing the decree of PROUDFOOT, V. C., 23 Gr. 507, that the plaintiff was not entitled to relief, as the formation in question was not part of the highway, but an artificial structure constructed for harbour purposes under the authority of the Act.

Held, also, that gradual accretions in front of a road allowance running down to the lake form part of the road, just as similar deposits in front of a lot accrue to the owner thereof.

Held, also, that although the statute 10 Geo. IV. ch. 11, did not expressly authorize the company to build a wharf in front of the street, the recognition of the right in subsequent statutes was sufficient.

THIS was an appeal by the defendants from the decree of Vice-Chancellor Proudfoot, reported 23 Gr. 507. The facts are fully stated there, and in the judgments on this appeal.

The following were the reasons of appeal:—

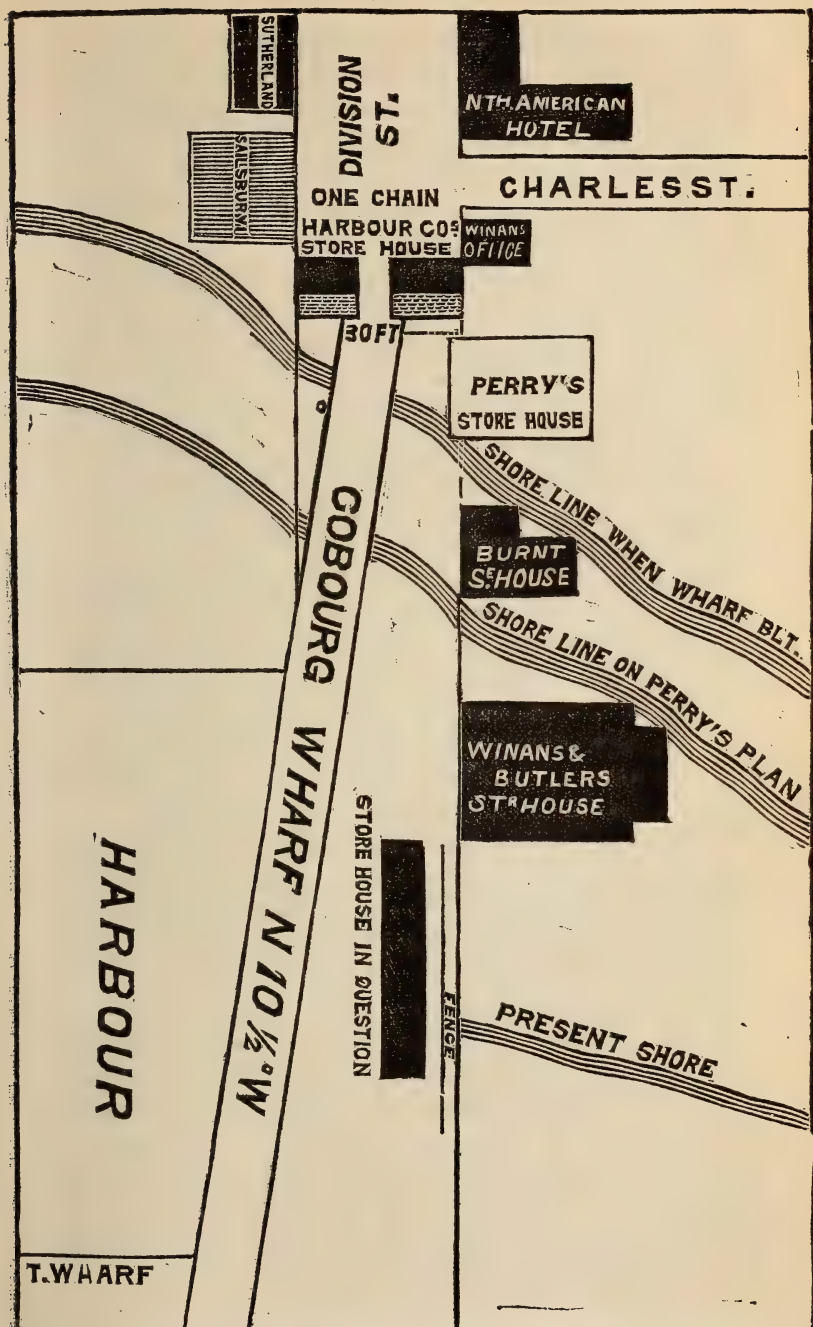
1. The plaintiff has not established his title to the property claimed by him as to which the alleged nuisance exists. He has no title to it under the Crown patent and other title deeds produced. There is no evidence shewing its slow, gradual, and imperceptible formation by accretion or otherwise, which would bring the case within *Rex v. Yarborough*, 3 B. & C. 91, and 1 Dow. & Cl. 178; on the contrary the evidence shews that the additions to the mainland to the east of the harbour were occasioned by the construction and extension of the pier, and but for the

opus manufactum no such accession to the soil would have taken place: *Smart v. Dundee*, 8 Bro. P. C. 119. Besides, the growth of the soil claimed by the plaintiff and its encroachment on the lake are clearly traceable on the ground by means of marks and boundaries, which preclude the plaintiff from asserting ownership as to alluvium: *Chitty's Prerog. of Crown*, pp. 206, 207; *Attorney-General v. Chambers*, 4 DeG. & J. 55; *Callis on Sewers*, 48, 49.

2. The fence and storehouse complained of are erected on ground which forms part of the Cobourg harbour. This ground was made artificially and intentionally for the use and convenience of the harbour. The expense of forming, extending, repairing, and preserving it has been always defrayed by the revenue derived from the harbour, and it has been always used for the purposes of the harbour. It has been recognized and dealt with by the Legislature as harbour property, and the right of the appellants to it should not now be questioned: *Chad v. Tilsed*, 2 B. & B. 403; *Attorney-General v. Richards*, 2 Anst. 602; *Hale de Portibus*, p. 85.

3. The municipal corporation of Cobourg have never claimed this part of the harbour property as an extension of Division street; on the contrary, the corporation applied by petition to Parliament for an Act to vest the said harbour and other properties (then held by the corporation under an Act of Parliament) in commissioners. This Act was passed, and the defendants are the commissioners thereunder: *Ross v. Corporation of Portsmouth*, 17 C. P. 195.

4. The allowance for road made by the Crown terminated at the water's edge at the time of its dedication (prior to 1828). Nothing has been done since that time by the municipality to extend such road over the land recovered from the lake by the harbour company. This so-called extension is not in any sense a street over which the plaintiff has the right of unobstructed passage, as claimed by him, with reference to the land alleged in the bill to be his. The alleged user by the public of the so-



called extension of Division street was a user of it as part of the wharf and pier of the harbour company, and this user must be subordinated to the rights of the appellants on the harbour property: *Dunlop v. York*, 16 Gr. 216; *City of Hamilton v. Morrison*, 18 C. P. 228; *Hood v. Harbour Commissioners*, 34 U. C. R. 87; *Regina v. Haldimand*, 38 U. C. R. 396.

5. If the land on which the fence and storehouse stands is not the property of the harbour company, it is the property of the Crown, and the Crown has acquiesced in and confirmed the acquisition of it by the expenditure of harbour funds, and has recognized and sanctioned the use of it by the appellants; and as against the plaintiff, the harbour commissioners have lawfully used the said land: *Attorney-General v. Jones*, 2 H. & C. 347; *Hale de Portibus*, ch. 7, pp. 73, 85.

6. The plaintiff has no right or *locus standi* to interfere with or complain of the manner in which the appellants have utilized the property vested in them: *Giles v. Campbell*, 19 Gr. 226; *Johnson v. Archambault*, 12 L. C. R. 138.

7. The commissioners have acted within the scope of their powers, and no personal liability attaches to them, and no enquiry as to damages should have been directed against them: *Boulton v. Crowther*, 2 B. & C. 703.

8. No relief should have been decreed, and the suit should not have been entertained against the defendant John Sutherland; besides, the record is defective because of the absence of the commissioner Guillet as a party thereto.

The respondent's reasons against the appeal were:—

1. The evidence established that the accretion to the respondent's land was formed slowly, gradually, and imperceptibly, and on the evidence the learned Vice-Chancellor found it to be so; and the defendants by their answer admit that it was so formed, and having been so formed it belongs to the respondent: *Throop v. The Cobourg and Peterborough R. W. Co.*, 5 C. P. 509; *Buck v. The Cobourg and Peterborough R. W. Co.*, 5 C. P. 552.

2. The Crown has always acquiesced in this accretion belonging to the respondent, and even if the accretion was the result of the construction and maintenance of the piers, which the respondent does not admit, he is nevertheless entitled to it, and certainly as against those constructing and maintaining the piers.

3. The Act incorporating the harbour company is one of a class of Acts that are to be construed restrictively ; and it gave the company no power to take any part of the public highway, between lots 16 and 17, or to interfere with the right of the public to use such highway to the water's edge, or to prevent the public having access along such highway to the water : *Galloway v. The Mayor of London*, L. R. 1 H. L. 34 ; *Magee v. The London and Port Stanley R. W. Co.*, 6 Gr, 170 ; 10 Geo. IV., ch. 11.

4. The building and extending their pier by the harbour company from where the said highway reached the water lakewards in a line with such highway was in effect an extension of the highway, and gave the public a right to pass over and use such pier as a highway to the water : *Marshall v. The Ulleswater Co.*, L. R. 7 Q. B. 166, 3 B. & S. 732 ; *Eastern Counties R. W. Co. v. Dorling*, 5 C. B. N. S. 821.

5. The pier so constructed by the company was only thirty feet wide and occupied only the westerly thirty feet of the said highway, and leaving the easterly thirty-six feet of the said highway uninterfered with, which said thirty-six feet was gradually extended by accretion, and was never interfered with in any way so as to prevent access to the water by the public along the same until long after the passing of the Act 13 & 14 Vic. ch. 83 ; and upon the extension of the easterly thirty-six feet of the said highway is erected the fence and storehouse complained of.

6. The public never acquiesced in any interference by the harbour company with their right to use the said highway to the water, but on the contrary asserted such right and compelled the company to remove a storehouse the

company had placed across the highway; nor would any such acquiescence prevent the public from now asserting their said right: *Turner v. The Ringwood Highway Board*, L. R. 9 Eq. 418.

7. The respondent denies that the fence and storehouse complained of are erected on grounds which form part of the Cobourg harbour, and that this ground was made artificially and intentionally for the use of the harbour, and that the expense of forming, extending, and preserving it has been always defrayed by the revenue derived from the harbour, and that it has been recognized and dealt with by the Legislature as harbour property; and affirms that the evidence shews that the first work done on the highway to the east of the company's pier was done by Evans, who put down a crib there, under the direction of the town council, for the preservation of the highway, to prevent people trespassing by taking away sand from and digging holes in the highway: that the next work was done by Greenwood, by the direction of the town council, in order to enable the railway to be run on to the pier, and was in fact done for the use of the railway; and that the only other work done there prior to the Act 22 Vic. ch. 72, was done by Huffman, in repairing Greenwood's work: that none of the said work was done for the use of the harbour as such, and that all the said work was paid for out of the general funds of the town; and the appellants utterly failed to shew that any part of the cost of any of the said work was defrayed by revenue derived from the harbour, or that there was while the said work was being done by Evans, Greenwood, and Huffman, any separate account kept of the revenue derived from the harbour, or that such revenue was kept separate from the general funds of the town.

8. There was no evidence to shew that the harbour commissioners had up to the time of the grievances complained of ever claimed the work so done by Evans, Greenwood, and Huffman, to be part of the harbour property, or that they had even laid out any money in repairing it, but on

the contrary, the public had always used it without interruption, and the town had built a sidewalk thereon for the use of the public; and the Act 22 Vic. ch. 72, did not vest it in the commissioners, nor did it in any way deprive the public of their right to it as a highway.

9. The municipal corporation had no authority to deprive the public of the highway to the water, except by a by-law duly passed for that purpose, nor could they make *that* harbour property which was before public highway without such by-law; and therefore the work which was done by such corporation to the east of the company's pier could not become vested in the commissioners under the words used in the Act 22 Vic. ch. 72.

10. The commissioners had allowed the respondent to build a storehouse on the accretion and on the east side of the work done by Evans, Greenwood, and Huffman, the only approach to which was over such work, and never objected thereto, and cannot now be heard to say that such accretion does not belong to the respondent, nor that the said work is not a part of the public highway.

11. The harbour company were not warehousemen, nor had they any authority to erect storehouses for the purpose of leasing them, nor had the municipal corporation any authority to do so, nor had the defendants, as commissioners, any authority so to do, and the erection of the said storehouse was a wholly unlawful act: *Logan v. The Cobourg Harbour Co.*, 3 U. C. R. 55.

12. The evidence shewed that the defendants did not act, in erecting the fence and storehouse, *bond fide*, and were properly ordered to pay damages; but the enquiry as to damages was waived by the respondent before the master.

13. No objection was raised at the hearing that Guillet was not made a party, and the respondent was prepared at the hearing, and is now prepared with Guillet's consent to be made a party and to be bound by the decree; and Sutherland is a proper party: *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R. 4 Ch. App. 146.

The case was argued on 17th March, 1877. (a).

C. Robinson, Q. C., and *J. A. Boyd*, Q. C., for the appellants.
J. D. Armour, Q. C., for the respondent.

The arguments sufficiently appear from the reasons for and against the appeal.

The following additional cases were cited:—

For the appellants: *Plumb v. McGannon*, 32 U. C. R. 8; *Gage v. Bates*, 7 C. P. 116; *Howard v. Ingersoll*, 13 Howard 381; *Doane v. Broad Street Association*, 6 Mass. 332; *Ashby v. Eastern Railroad Co.*, 5 Met. 368; *Hood v. Toronto Harbour Commissioners*, 34 U. C. R. 87; *In re McBride and the Corporation of York*, 37 U. C. R. 358; *Regina v. Corporation of Yorkville*, 22 C. P. 431; *Regina v. Inhabitants of Hornsea*, Dears. C. C. 351; *Wood v. San Francisco*, 4 Cal. 190; *Logan v. The Cobourg Harbour Co.*, 3 U. C. R. 55; 7 Wm. IV., ch. 42; 13 & 14 Vic. ch. 83; 22 Vic. ch. 72; 36 Vic. ch. 120, O.

For the respondent: *Rex v. Yarborough*, 2 Bligh 147; *Regina v. Inhabitants of Greenhow*, L. R. 1 Q. B. Div. 703; *Doe dem. Seebristo v. East India Co.*, 10 Moo. P. C. 140; *Scrutton v. Brown*, 4 B. & C. 502; *In re Hull and Selby R. W. Co.*, 5 M. & W. 327; *Smith v. Her Majesty's Officers of State*, 13 Jur. 713; *Regina v. Hunt*, 16 C. P. 145, 17 C. P. 443; *Bolt v. Stennett*, 8 T. R. 606; *Scales v. Pickering*, 4 Bing. 448; *People v. Lambier*, 5 Denio 9; *Wetmore v. White Lead Co.*, 37 Barb. 70; *Jones v. Johnston*, 18 Howard. 150; *Cline v. Corporation of Cornwall*, 21 Gr. 129; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Regina v. Davis*, 24 C. P. 575; *Gunn v. Free Fishers of Whitstable*, 11 H. L. C. 192; *Attorney-General v. Terry*, L. R. 9 Chy. 423; *Moore v. Corporation of Esquesing*, 21 C. P. 277; *In re Annis and the Corporation of Mariposa*, 25 C. P. 133.

December 17, 1877. (a) PATTERSON, J. A.—The bill alleges that the plaintiff is owner of land in Cobourg,

(a) *Present*.—MOSS, C. J. A., BURTON and PATTERSON, J. J. A., and BLAKE, V. C.

fronting on Division street, which is the original allowance for road between lots 16 and 17, in the broken concession B, of the Township of Hamilton, and a common and public highway; and complains that the defendants, other than the Attorney General, have obstructed the plaintiff's access to his land by placing a fence and a storehouse upon the highway. The answers set up that the acts complained of were done by the defendants as Commissioners of the Cobourg Town Trust, and that the place where the fence and storehouse were placed is not a highway, but is a pier or wharf forming part of the Cobourg harbour.

The place in question is a long way from what was the water's edge at the time of the original survey of the Township. It has been reclaimed from the lake, or has come into existence as dry land, as has also the land in right of which the plaintiff's claim is asserted, by means of works constructed in connection with this harbour, or accretions gradually deposited by the action of the water.

The evidence has been directed to explain how this was done; and we have to decide whether the effect of what is shewn to us is to create the rights which the plaintiff now asserts.

The Statute 10 Geo. IV. ch. 11, passed in 1829, by section 2. authorizes the Cobourg Harbour Company to construct a harbour at Cobourg, and also to erect and build all such needful moles, piers, wharves, buildings, and erections, whatsoever as should be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering, lying, loading and unloading within the same; and to alter and amend, repair and enlarge the same as might be found expedient and necessary.

Section 3 provided for arrangements with the owners of land through or upon which the Directors of the Company might determine to cut or construct the harbour with all necessary and convenient roads, streets, and approaches thereto.

And section 4 gave power to take toll on all goods shipped or landed on board any vessel or boat from or upon any

part of the lake shore between lots 13 and 19 in the Township of Hamilton, and upon all vessels and boats entering the harbour.

Under this authority the company began work in 1830, running a wharf from the end of the allowance for road between lots 16 and 17, which is called Division street, out into deep water; the first crib being partly on land and partly in the water on or in front of the street. This wharf did not run out in the line of the street, but inclined towards the west. Another wharf was built farther west so as to form a basin.

It has been urged as a point on which something may turn, that the construction of the wharf in front of Division street was an unauthorized act, because this statute does not expressly authorize the company to make a wharf in front of any of the streets of the town.

If there were anything in the objection, it would clearly be concluded by the recognition of the right in subsequent statutes. In 1832 the Act, 2 Wm. IV. c. 22, was passed. It recited the progress made by the company in the erection of the harbour, the most important part of which was the very wharf in question, and authorized a loan of £3,000 upon the credit of the province to assist in the completion of the undertaking. In 1835 a further loan of £1,000 was authorized by 5th Wm. IV. c. 43; and in 1839, the time for the completion of the harbour was extended by 2 Vic. c. 42, which statute also increased the capital stock of the company. The same recognition of the works as being *intra vires* runs through other Acts. A question not unlike this was lately raised before Malins, V. C., in *Ecclesiastical Commissions v. North Eastern Railway Co.*, L. R. 4 Chy. Div. 845, in which he held (p. 856) that the working of collieries by a company not originally authorized to engage in that business was legalized by indirect recognition in an Act of Parliament.

In 1837 a Board of Police for Cobourg was established by the Act 7 Wm. IV. c. 42. Sec. 26 conferred on the board powers of making or amending streets within the town,

with a proviso forbidding the laying out, opening, or establishing any new street which might interfere with the powers conferred on the harbour company by the third clause of the Act of 1829.

The Act of 1850, 13 & 14 Vic. c. 83, recited, *inter alia*, that the harbour had never been completed: that by an indenture of 18th August, 1842, the company had conveyed the harbour and its appurtenances to the Board of Works in security for all such moneys as the Provincial Government had expended, or should expend on the harbour: that £10,500 or thereabouts had been expended: that it was desirable that the harbour should be made as safe, commodious, and convenient as possible; and that the Town Council were interested in improving and keeping improved the harbour for the purposes of the trade of the town, and attracting thither vessels navigating the lake; and it then dissolved the Corporation of the Harbour Company and vested in the Municipal Corporation of Cobourg the harbour and all the lands attached thereto, and the moles, piers, wharves, buildings, erections, and appurtenances, and all other things erected, or being, or belonging to, or used with, or in the harbour, and theretofore vested in the company, and all other moles, piers, wharves, buildings, and erections to be thereafter erected, set up, or established in the harbour, &c., &c.

Section 4 authorized the Town Council to make additions and improvements in and to the harbour, and gave very full powers for that purpose; and section 5 authorized the borrowing of money for the purpose of completing and improving the harbour, and of erecting additional wharves, moles and piers therein, and of making such other additions and improvements therein as the Town Council should resolve on and approve.

It appears from the evidence that the passage of this Act was followed promptly by the dredging of the harbour by Messrs. Cotton and Rowe, who deposited the mud on the east side of the wharf; and that to retain these deposits and prevent their being washed away, crib work was placed on the outside.

I see no reason whatever for holding that in so filling in by the crib work and by the earth dredged from the basin, the Town Council acted, or assumed to act, in any other way than under the powers which they had for adding to and improving the harbour.

Cotton and Rowe dredged in 1850. Greenwood is said to have done the Crib work some time in or between 1853 and 1856. In 1859, the Commissioners of the Cobourg Town Trust were appointed by 22 Vic. ch. 72, and the harbour, wharves, piers, and appurtenances were, with other property of the town, vested in those commissioners. Under them further work, which I understand to have been crib work, was done by Munson—and more dredging was done, the mud being deposited on the wharf and carried eastward.

I gather from the evidence that the work done by Cotton and Rowe, and by Greenwood, was partly for the purpose of enabling a railway track to be laid along the wharf. The track was laid, but after a couple of years was abandoned on account of the sharpness of the curve. The store house, the removal of part of which is one of the present causes of complaint, was built to accommodate the traffic expected from the railway, which was one of the purposes for which the addition had been made to the width of the wharf.

The plan before us shews the shore line of 1830, when the wharf was built. It shews the original wharf of thirty feet width, beginning a little north of the line so marked, being apparently placed about the centre of the 66 feet which formed the width of the street, and running some 18 or 20 chains out into the lake, but running obliquely so as to cross the west line of the street, produced, at about two chains from its starting point. Another shore line is shewn called "shore line on Perry's plan," which seems to indicate the extent to which the shore had advanced southward at the date to which Perry's plan refers. This line touches the wharf at or near the point where the west side of the wharf intersects the west line, produced, of Division street. The

plan then shews the addition on the east side of the old wharf, extending some seven or eight chains from the last mentioned shore line. The structure composed of the original wharf and the addition fills the entire space which would be occupied by Division street, if produced. Its eastern line seems to correspond with the eastern line of the street, but the whole structure is wider than the street by reason of the oblique direction of the western line, which is the west side of the wharf. The present shore line east of the line of the street, produced, is laid down about three chains from that described as shore line on Perry's plan. The space between these two shore lines represents the accretion in front of the plaintiff's land. This is the land in respect of which the plaintiff now asserts the right of access to the alleged highway. His claim is, that the whole structure in question is highway, or that at all events that part of it which is the addition to the old wharf must be held to possess that character. The obstructions of which he complains are upon the addition, and prevent access to it from this adjoining land which, since the erection of the addition, has accrued to him from alluvial deposits.

I have no doubt gradual accretions in front of a road allowance become part of the road allowance, just as similar deposits in front of a lot accrue to the benefit of the owner of the adjacent land.

A lot which, in the original survey, is bounded on the lake, will have the lake for its boundary, though the water may have encroached upon it or gradually receded; and the same rule must apply to the allowances for roads, which are parts of the territorial divisions of the country just as the lots are. All the alluvial accretion gradually and imperceptibly formed by the action of the water, whether unassisted or directed by the structures of the Harbour Company, would become part of the township of Hamilton or the town of Cobourg.

I do not perceive any difficulty from the consideration suggested by Mr. Robinson, that by so holding we impose on the municipality novel duties or burdens. The accre-

tion being from day to day, and imperceptible in its progress, which is the hypothesis; and the statutory duty to repair being understood—as settled by recent decisions, *Toms v. Corporation of Whitby*, 35 U. C. R. 220, 37 U. C. R. 100—to require only that the road shall be reasonably fit for the ordinary traffic of the locality, we create no hardship and impose no unreasonable burden by holding that, if the duty exists to maintain a road in such repair as to afford a reasonably safe and convenient access to the water, that duty remains although the action of the water may wear away or add to the roadway.

This applies, however, only when the accretion is gradual. The addition to the wharf, the history of which I have glanced at, is not of that character. If gradual accretion had any share in its formation, as some witnesses seem to think it had, it must have been a very small share: indeed no one asserts that any part of it which ever took the shape of dry land was so formed. Substantially, if not absolutely and literally, the whole is an artificial structure. It was the work of the authorities charged with the construction and maintenance of the harbour. It was constructed for harbour purposes. It was not even within the limits of the town or township. It was made part of the town by 13 & 14 Vic. c. 83, s. 2, which enacted that “the said harbour, in its present or future state, and with any additions that may be made thereto, shall, and the same is hereby declared to be within the limits, and to be part of the town of Cobourg.” It was thus made part of the town as harbour, not as highway.

The law on the subject of alluvial accretion is so well settled as scarcely to require reference to decisions to illustrate the general principles by which it is governed. I may however be permitted to quote two passages which express some of the doctrines applicable to the case before us. One is from the judgment of the Judicial Committee of the Privy Council in *Doe dem. Seebristo v. East India Company*, in 10 Moo. P. C. at p. 158, where it is said: “The land claimed has become land by way of gradual accretion. A.

question of law was raised whether, supposing the accretion, granting it to be gradual, was one which had been contributed to, or even purposely contributed to, by the act of the defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law." The other is from the judgment of Jervis, C. J., in *Rex v. Hornsea*, 1 Dears. C. C. at p. 304. Speaking of a highway, he said: "If the sea imperceptibly retreated, there might be an obligation to repair to the sea, but not if the sea retreated visibly and at once." The general law, under which the plaintiff's title to the accretion in front of his land is indisputable, is stated in very clear and instructive terms by Lord Chelmsford in *Attorney-General v. Chambers*, 4 DeG. & J. at pp. 66 et seq.

The work done in 1850, and from that until 1856, and which included the construction of that part of the wharf on which the fence and storehouse stand of which the plaintiff complains, was, in my opinion, clearly authorized by the effect of the several statutes to which I have referred. Those statutes would afford an unanswerable defence to an indictment for unlawfully obstructing either the highway or the navigation.

When this work, which the plaintiff asserts to be highway, was constructed, the plaintiff had no peculiar rights differing from those of any one of the public. The land in respect of which he claims had not then come into existence. It seems in fact to owe its existence to the construction of these very works. According to Mr. Daintry's plan, the distance from the south side of Winan & Butler's storehouse to the present shore line is 1 chain 42 links, or about 95 feet. At six feet per year, which Mr. Armour computes to be the rate of increase, it would take over fifteen years to make all this land.

One witness says that in 1851 the shore line was about the centre of the store house, or more than half a chain

farther back than the south side of the building, as laid down on the plan, requiring five or six years' accretion, or say till 1856, before any part of the plaintiff's land, which is the subject of our attention, emerged from the water.

The land never abutted on navigable water on the side now in question. The wharf was there, and, as I have shewn, it had not become a highway. It separated the navigable water from the plaintiff's land. Even if the plaintiff crossed the wharf and reached the water, he would not have attained a navigable highway which he could use as of right, because the public right had been abridged by the Act of 1829, which empowered the Harbour Company to impose tolls on all vessels and boats entering the harbour.

These circumstances conclusively answer the contention which was rested on the authority of *Eastern Counties Railway Co. v. Dorling*, 5 C. B. N. S., 821, in which case the defendant, having the right to pass from a navigable river to a quay, was held to be justified in passing over a barge or dummy which the plaintiffs had permanently moored in front of the quay; and *Marshall v. Ulleswater Steam Navigation Co.*, L. R. 7 Q. B. 166, where the same law was applied to the case of a wharf extended without authority in front of the land of a riparian proprietor. In the first of these cases the ground of decision is stated in these words: "The defendant had a right to use the river as a highway until he got near enough to the quay to exercise his right of landing upon it. * * The plaintiffs' dummy interfered with the right of the defendant to pass over the place as a way, which right he could not exercise in any other manner than by removing or passing over the dummy. The defendant, therefore, was entitled to abate the nuisance to him thereby caused."

In *The Ulleswater Case* the point is put in a few words by Mr. Justice Lush: "The pier prevents the defendants using their right of navigation, and therefore they have a good justification for passing over it; just as in the case of a person placing a gate across a high road, or maintaining it there, and then seeking to bring an action against

a person who could not use his right on account of the gate, for trespass in climbing over it."

In both of these cases two important facts existed which are wanting in that before us, viz., the right to navigate the water where the obstruction was placed, and the absence of authority for creating the obstruction. This effectually distinguishes the cases, and shews that they afford no support to the theory advanced on behalf of the plaintiff, without making it necessary to consider whether, if the same right were conceded to this plaintiff which was exercised and applied in those cases, it would go the length of entitling him to the relief he seeks.

I am of opinion that the appeal should be allowed, with costs, and the plaintiff's bill dismissed, with costs.

BLAKE, V. C.—The right which persons otherwise would have had to use Division street to reach the water, was controlled by the powers from time to time given to the Harbour Company, the Corporation and the Commissioners. To the extent that the construction of the harbour and its works interfered with the public reaching the water, to that extent this right, which would otherwise have existed, was limited. A pier was run by the company, as they had a right to place it, to the extent of 30 feet in front of Division street. To the east of this from time to time were placed cribs and earth, and the result has been that, to the east of the pier there has been formed, partly by accretion and partly by the act of those representing the harbour, an addition, over which the plaintiff claims a right to pass unimpeded by any erection of the defendants. It is clear from the evidence that this formation in front of the easterly 36 feet of Division street cannot be traced to accretion. The evidence makes this plain, and the fact that immediately to the east of the erection complained of, the shore does not extend to the south within several chains of this formation shews that much of the increase should be traced to the work done by the Harbour Company, Corporation, or Commissioners. What has been

done is for the improvement of the harbour, and is embraced in the work designated or sanctioned by the Acts which have been referred to. The Harbour Commissioners are entitled to protect in every reasonable way the harbour and their piers and works, and are at liberty to fence the wharf or otherwise to preserve the property, and to render as safe as possible their premises from those who would remove or damage what may be stored with them. They are at liberty to designate the mode by which the public shall enter on their premises, and can say to those owning property to the east of their piers, that they must not approach the wharf, save through their northerly entrance. This is what virtually has been done in the present case, and it is this act which is complained of by the plaintiff in his bill. I do not see on what principle we can hold, that to the extent of 30 feet the Harbour Company can claim a right to erect a pier to the south of the street, and that on the remaining 36 feet this right does not exist. Under the various Acts on which the defendants rely, I am of opinion that they could have utilized all the water needed for the purposes of their incorporation to the south of Division street. They are not now doing more than this, and I do not think the Court can prevent them so using the property in question. I think the appeal should be allowed, and the bill dismissed, with costs.

MOSS, C. J. A., and BURTON, J. A., concurred.

Appeal allowed.

NOTE.—The case of the *Cobourg and Peterborough R. W. Co. v. Throop*, was, on the 3rd March, 1859, affirmed in appeal, McLean, J., dissenting. As the case is often referred to on the general doctrine of accretion, and has not been reported in appeal, it may be convenient to give here the following extract from the judgment of the Court delivered by the late SIR JOHN B. ROBINSON:—

* * * And on 23rd February, 1828, Buck conveyed to Benjamin Throop, the plaintiff's husband, a tract described thus: "Beginning on the Western limit of First street, at the south-east corner of other land belonging to B. Throop; thence south 9° 30', east 5 chains more or less to high water mark," &c. This last boundary carried down the tract

to that point southerly which was then usually washed by the waters of the lake when they were high—either from periodical or other rise in the height of the water of the lake generally, or from the wash of the water of the lake when driven upon that part of the shore by the winds.

We must give some meaning to the words “high water” which the parties have used in this deed; and as we have no flux or re-flux of the waters of the lake from tides, I know no other construction to give to the words “high water” than I have just stated.

* * * It does appear that a great alteration has taken place in the water line along the front of lot 17 of late years, and since these deeds were made, which alteration was ascribed by witnesses upon the trial in a great measure to an effect produced by the piers forming Cobourg Harbour, in increasing the deposit made by the surf on that portion of the lake shore.

High water now at that point is far south of what it was in 1828, in consequence of the accretion I have just mentioned; and where the gain by accretion has not arisen from any sudden and violent change, but has been “gradual and imperceptible,” according to the sense which is now put on those terms by Courts of Justice, the high water mark, as it stands from time to time, influenced by this imperceptible increase to the width of shore, is what is to be regarded.

If it were otherwise, the consequence of such a change by accretion, though to a much less extent, would be most disastrous to proprietors by shutting them out from the water altogether.

Little or nothing was said upon the doctrine of accretion in the argument before us. It seemed, indeed, to be conceded that the defendants' claim to a verdict in their favour rested on their being able to establish that the description in their deed to Kittridge confined the tract to what they call “the bank” above the beach, and did not touch the waters of the lake.

The doctrine of accretion nevertheless does form a feature in the case, and it has, I think, clearly the effect in the present instance, looking at the facts in evidence, of attaching to the plaintiffs' land as it stood when his title accrued, or rather as it stood when Kittridge took his deed, all the land which has been since formed by imperceptible degrees in front of it—that is, imperceptible, not with reference to a comparison that might be made after a lapse of some years, but imperceptible in the effect to be observed from day to day, and week to week.

The late learned Chief Justice of the Common Pleas, in his judgment in this case, discussed very ably and carefully the doctrine of accretion. I agree in his statement of the law as deduced from the general current of authorities. The same view has been taken of this point in the cases in this Court to which he referred.

I will add a reference to a late case decided before the Judicial Committee of the Privy Council in England, *Doe v. East India Company*, 10 Moo. P. C. Cases 158, which case turned upon the effect upon the rights of the parties of an accretion of soil on one bank of the River Hooghly.

I cite the case principally because of one passage in the judgment which bears upon the fact that the accretion in the case before us was not wholly an accretion from natural causes, but was in a great measure caused, as I have mentioned, by an artificial work.

The defendants in that case had made an improvement upon the bank of the river, which it was alleged had contributed to the accretion, and in regard to that the Court observes: "A question of law was raised, whether, supposing the accretion (granting it to be gradual), was one which had been contributed to, or even purposely contributed to, by the act of the defendants, that would not take the matter out of the ordinary law with respect to the accretion. The Court below thought, and we think rightly, that that made no difference. If there were a gradual accretion, which was not denied, it was one which would be dependent upon ordinary law."

Here it is not even pretended that the plaintiff, or those before her in the title, had by any act of theirs contributed to the accretion. It was the work of the Cobourg Harbour Company.

BLACKBURN V. LAWSON.

Insolvency—Use and occupation—Action for.

The plaintiff sued the defendant for the use and occupation of a store from the 1st of April to the 1st of July, 1875. The defendant had made an assignment under the Insolvent Act of 1869, on the 20th of April, but the assignee only occupied the shop while removing the goods to another store which the defendant owned, when he returned the key to the defendant. On the 1st of May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon its confirmation. The deed was confirmed on the 14th June, when the defendant was allowed to continue on his own account the business which, since his assignment, he had nominally conducted on behalf of the assignee; but no written re-conveyance was ever made. It was proved, however, that people who wished to see the store applied to the defendant and were shewn over it by his son: that the plaintiff's agent had recognised the defendant as having possession by sending people who inquired about the shop to him as being the person who had it to dispose of: that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequence of the deed of confirmation, and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st of July.

Held, reversing the judgment of the County Court, that the action for use and occupation would lie against the defendant, notwithstanding the assignment, as the evidence shewed an occupation with the mutual recognition of the plaintiff as landlord and the defendant as tenant; and a sufficient transfer from the assignee to the defendant.

THIS was an appeal from the judgment of the Judge of the County Court of York, holding that the plaintiff (the appellant) was not entitled to recover against the defendant for the use and occupation of the plaintiff's premises from 1st April to 1st July, 1875. The facts are stated in the judgments on this appeal.

The case was argued on the 25th June, 1877. (a).

H. J. Scott, for the appellant. The evidence shews that the respondent held possession of the leased premises subsequently to the first day of April, and that the appellant did not take possession until after the first day of July; the respondent is therefore liable for the whole quarter's rent, whether he was in actual occupation all the time or not. The respondent's insolvency cannot deprive the appellant of his right to sue for the use and occupation of the premises, as he was not placed on the schedule of

(a) *Present*.—MOSS, C.J.A., BURTON and PATTERSON, JJ.A. and GALT, J.

creditors. He referred to *Woodfall's L. & T.*, 10th ed., 706, and *Mollet v. Brayne*, 2 Camp. 103.

D. McMichael, Q. C. for the respondent. This action will not lie against the respondent, inasmuch as the effect of the assignment in insolvency was to vest the term in the assignee, and to relieve the respondent from all liability. He cited *Gibson v. Courthope*, 1 D. & R. 205.

December 17, 1877. Moss, C. J. A. (a)—The plaintiff became the owner of the premises on 1st January, 1874, when the defendant was in possession as tenant of the former owner. He continued in possession without any written lease from the plaintiff, at a quarterly rent of \$162.50, which he paid up to 1st April, 1875. The plaintiff did not actually receive possession from the defendant until after the 1st of July, 1875, and I apprehend that during the interval nothing appears by the evidence to have taken place between the plaintiff and defendant themselves, which should deprive the former of the right to recover the quarter's rent. It is not pretended that the landlord's title had expired, or that he had evicted the defendant, or that there had been any agreement, express or implied, on his part to resume and on the tenant's part to abandon possession, from which a surrender by operation of law would arise. But on the 20th of April, 1875, the defendant made an assignment under the Insolvent Act, and his contention is, that the landlord's only remedy for his rent is against the assignee.

This contention, which prevailed in the Court below, is mainly founded upon the proposition that the effect of the assignment is to vest the term absolutely in the assignee, in the same manner and with the same incidents as if the landlord had assented to an assignment of the term and accepted him as tenant. I do not think that for the decision of this case we are called upon to pronounce

(a) *Present.*—MOSS C.J.A., BURTON and PATTERSON JJ.A., and GALT, J.

any opinion on the provisions of the Insolvency Act relating to leaseholds. Upon the special state of facts here shewn, the defendant appears to me to be clearly liable in this action notwithstanding the assignment, for I think it should be held that he occupied the premises during the three months, recognising the plaintiff as landlord, and recognised by him as tenant. If that be the proper result of the evidence, it is well settled law that the defendant is liable in an action for use and occupation.

Indisputably that had been the relation between them up to the 20th April, the date of the assignment. The assignee did not take possession of the premises further than was necessary to remove the goods to another store upon King street, which was occupied by the defendant. As soon as this was done, the assignee gave back the key of this Yonge street store to the defendant.

It is manifest that the defendant must almost contemporaneously with his assignment have proposed to his creditors a deed of composition and discharge, for on the 1st of May he himself executed such an instrument, which provided for the restoration to him of his estate upon composition notes being deposited with the assignee and a binding agreement being made by the defendant and one Sarah Lawson, to execute a conveyance of a specified security. By the 20th of May this deed seems to have been executed by the creditors, and it was soon afterwards confirmed. During the pendency of these proceedings the defendant carried on business at the King street store, to which the stock on the premises in question had been removed, just as he had done before, except that the assignee had a person in charge.

From all this it is to be inferred that the assignee's interference with the defendant was little more than nominal, and did not extend beyond what was necessary to secure the estate for the creditors in the event of failure of the negotiations for composition.

There is scarcely room for doubt that the removal of the stock to the other store was at the defendant's request, for

according to his son's evidence he had, before the assignment, entertained the idea of getting rid of the premises in question, and had approached the plaintiff's agent on the subject. This removal was not completed until the 12th of May, by which time it is reasonable to infer, from a comparison of the dates, that the defendant had assured himself of the acceptance of his proposed composition. It is remarked by the learned Judge that there is no proof of any re-conveyance by the assignee. I do not suppose that any formal re-conveyance ever entered into the contemplation of the parties. The assignee gave the defendant the key of these premises, and left him in possession of the other store and of the stock-in-trade. I can see no reason for holding that this was not quite a sufficient transfer, and it would certainly be misapplied ingenuity to start conjectural grounds in favour of the defendant, who from first to last practically remained in the beneficial enjoyment of his whole estate. His own statement shews that after the completion of the arrangement for composition, he treated himself, and not the assignee, as the person entitled to whatever interest an outgoing tenant could claim in the premises. He did not return the key to the plaintiff, but, on the contrary, it remained at his store. When persons came to enquire about leasing, his son accompanied them with the key, and permitted them to inspect the premises. When a person named Lynn, who ultimately rented the premises from the plaintiff, got possession of the key (apparently through the inadvertence of a lad in the defendant's shop during his son's absence) for the purpose of looking at the premises, he promptly sought to procure its return. There were certain fixtures on the premises to which he claimed to be entitled, and he wished to make arrangements for their purchase with any person who might lease the premises from the plaintiff. I have no doubt that it was mainly with this object he kept possession of the key; but I fail to see that that is any excuse for not paying the rent. As between him and the assignee, the possession was clearly in him during this period. He had taken the

premises off the assignee's hands. He had a use and occupation of the plaintiff's premises, which he conceived to be beneficial to himself. He did not choose even to offer to surrender to the plaintiff. Save the assignee's brief and nominal possession, he was in the sole occupation during the three months for which the plaintiff claims.

It is clear that the plaintiff ought to be paid by somebody. The defendant has received back from the assignee the whole of his estate, and has left him no assets to discharge this just claim. I should have been sorry to find that the law was so imperfect as to sanction the injustice of telling the plaintiff, under such circumstances, to have recourse to the assignee.

In my judgment, no rule of law does require us to impose such a hardship upon either the landlord or the assignee; but, on the contrary, the ordinary principles upon which the maintenance of the action for use and occupation depends, are quite wide enough to compel the payment of this claim.

The appeal should be allowed, with costs, and the verdict entered for the plaintiff in the Court below for \$162.50.

PATTERSON, J. A.—The plaintiff declares on the money account for the defendant's use by the plaintiff's permission of messuages and lands of the plaintiff.

The defendant pleads never indebted, payment, set-off, and a special plea to the effect that he had obtained a discharge in insolvency, under a deed of composition and discharge which covered the plaintiff's claim as a claim provable against the defendant's estate and mentioned in the statement of his affairs exhibited at the first meeting of his creditors.

This special plea is not sustained, because the debt sued for accrued, if at all, after the transactions set out in the plea. The whole question arises on the issue upon the plea of never indebted.

The evidence shows that the defendant occupied a shop of the plaintiff on Yonge Street, in Toronto, at a quarterly

rent, without any written lease. This action is for the rent for the quarter from 1st April to 1st July, 1875, or such part of it as the plaintiff may be entitled to. In April, 1875, the defendant made an assignment under the Insolvent Act of 1869; and the assignee, as speedily as possible, removed all the stock-in-trade from the Yonge street shop to another shop which the insolvent had on King street. The assignee did not occupy or use the Yonge street shop in any way except during the removal of the goods. On or about the first of May, a deed of composition and discharge was executed, and the discharge was confirmed on 14th June. About 12th May, the assignee left the key of the Yonge street shop at the King street shop, where the insolvent and his staff of clerks and salesmen had continued the business without interruption, one of the clerks being nominally in charge on behalf of the assignee.

The deed of composition contained a direction by the creditors to the assignee to deliver up and convey to the insolvent all his estate and effects upon the due execution and confirmation of the deed, and upon the deposit with him of the confirmation notes, and a binding agreement by the insolvent and Sarah Lawson to execute a conveyance of certain agreed security. No express evidence was given of the deposit of the notes and agreement. The learned Judge mentions that it was not pretended that a re-conveyance had been executed by the assignee before the first of July. In the absence of further evidence, I should assume that no written re-conveyance was ever made; but that the insolvent was, upon the execution of the deed of confirmation, allowed to continue, on his own account, the business which he had nominally conducted on account of the assignee.

Section 96 of the Insolvent Act of 1869, provided that the re-conveyance by the assignee to the insolvent, or to any person for him, of any part of his estate or effects, whether real or personal, if made in conformity with the terms of a deed of composition and discharge, should have the same effect (except as the same might be otherwise

agreed by the conditions of such deed or re-conveyance) as if such property had been sold by the assignee in the ordinary course, and after all the preliminary proceedings, notices and formalities therein required for such sale.

I apprehend the conveyance here spoken of does not necessarily mean a deed, or even a writing, but that a conveyance by any mode appropriate to the property conveyed would be effectual. I have no doubt that the stock-in-trade passed from the assignee to the insolvent by the delivery to him, or permitting him to retain the possession after he became entitled to the re-conveyance. That was in fact the re-conveyance of it. There is plenty of evidence, as against the defendant, that he was entitled to the re-conveyance, although the deposit of the notes and the security is not formally proved. The very fact of his continuing the business would of itself be sufficient; but there is the express evidence that he claimed the fixtures in the Yonge street shop as part of the assets which reverted to him in consequence of the confirmation of the deed, and that he or his agents tried to dispose of those fixtures to an incoming tenant; that the key of the Yonge street shop, which had been retained by the assignee, was restored by him, after the execution of the deed, to the defendant, who from that time on had the control of it; and there is an expression used by the defendant himself in his evidence when speaking of the fixtures, which unfortunately for him he had not succeeded in selling, "they are part of the assets that I have had to pay for since, and got nothing for them," which evidently refers to the payment by means of the composition.

The landlord resumed possession on the first of July, although, as far as we see, he was under no obligation to do so; and so put an end to any further claim for rent against the defendant or the assignee. He ought to be paid his rent up to that date, and the defendant is the man who ought to pay it. No reason has been suggested, and none can be given why the landlord should lose the rent, or why the assignee should pay it out of his own pocket

after having handed over all the estate to the defendant. Still, if to allow the landlord to recover in this action would violate the sanctity of any principle of law, injustice must be done, and he must lose his rent. I think, however, that law and justice are not, in this case, irreconcilable.

Passing over for the moment the question of the reconveyance of the term in the Yonge street shop, if the term had vested in the assignee, it seems clear that the *possession* of the shop, as between the defendant and the assignee, was in the defendant during the last half of the three months which ended on 1st July.

The assignee had never meddled with the premises beyond removing the goods and locking the door. As soon as the composition was effected, he handed over to the defendant the key, which was the symbol of possession—or left it with the defendant's knowledge and assent at his place of business for him. People who wanted to see the shop came to get the key, and the defendant's son, who appears to have chiefly acted in the matter, used to go with them to show them the shop. One Lynn spoke of taking the place, and the defendant endeavoured to sell him the fixtures. The negociation was carried on principally by the defendant's son and his book-keeper. When it failed, they repeatedly went to Lynn's house to get back the key, though without success. The key had been given to Lynn to enable him to see the shop and the fixtures by a junior clerk of the defendant, who seems to have been less careful than the son, as the latter did not part with the key but went, as the defendant himself tells us, with parties to see the place. Then it is also shewn that the defendant was recognised by the plaintiff, through his agent, Mr. Tizard, as having the premises. Mr. Tizard says he sent persons who inquired about the place to the defendant as the person who had it to dispose of. He says also that the defendant offered him the key and wanted him to take the place off his hands before the first of July, which he refused to do. The defendant however denies that this took place; and his son, who does speak of some thing

of the sort having occurred between him and Mr. Tizard, says that was before the insolvency.

The evidence is not unlike that which in *Phené v. Popplewell*, 12 C. B. N. S. 334, was held to shew such a resumption of possession by the landlord as to work a surrender by operation of law. In that case the tenants, in March, 1861, having assigned all their property for the benefit of creditors, quitted the premises, tendering the key to the landlord, who refused to receive it. On the 12th April, they left the key at the landlord's office, and it was not returned. Nothing further was done till the 4th May, when the landlord went on the premises and caused the front of the house to be washed down. In June, the key was given to an auctioneer to enable him to shew the premises, and a board put up intimating that they were to let. The tenants' names were painted out on the 24th September, and on 26th October the landlord gave them formal notice that he had resumed possession. The action was to recover three quarters' rent from 25th January to 25th October. The defendants paid into Court one quarter's rent to 25th April, and succeeded in their defence as to the other two quarters, on the ground that the return of the key, coupled with the acts of the landlord subsequently to that date, shewed a surrender by operation of law.

In the recent case of *Oastler v. Henderson*, L. R. 2 Q. B. Div. 575, the judgment in *Phené v. Popplewell* is explained as having proceeded on the finding that there was a taking possession by the landlord in the first instance: not that the subsequent conduct related back to the receipt of the keys, although that conduct was taken as evidence to shew that the intention in using the keys was to take possession at once. In the case before us the resumption of possession by the insolvent is shewn by evidence much of the same character, and fully as strong as that which was held to shew that the landlord in *Phené v. Popplewell* had, as early as the 12th or 25th of April, taken the premises off the tenants' hands. Having regard to this evidence, and bearing

in mind that the defendant was, beyond dispute, the tenant for the first three weeks of the quarter; that during the interlude of the insolvency, whatever may have been the effect of the assignment, under the proper construction of the Insolvent Act, in creating a tenancy between the assignee and the landlord, the latter had not, by any act or word, so far as we can see, recognized the assignee as his tenant, or ceased to regard the defendant as always occupying that position; and further, that the assignee, when he restored the key to which the defendant had become entitled, did not restore the possession to the defendant as *his tenant*; and that the defendant never could have supposed that he was tenant of the assignee, or of any one but the plaintiff, and had no ground whatever for surmising that the possession had reverted to the plaintiff, or been cast upon him by any effect of the insolvency proceedings; the proper conclusion, and indeed the only one which can reasonably be reached from the materials before us is, that during the last part of the quarter, and at the time when the quarter's rent fell due from somebody, the defendant was the person in actual possession with the recognition and assent of both the landlord and the assignee.

This fact being so, it is clear that an action for use and occupation would lie against the defendant. The circumstance, which I assume at present for argument's sake, that the original term had passed to the assignee and had not been re-conveyed to the defendant, will not stand in the way where the incidents exist which are ordinarily necessary to the maintenance of the action, viz., occupation with mutual recognition of the one as landlord and the other as tenant. The cases of *Phipps v. Sculthorpe*, 1 B. & Ald. 50, and *Laurance v. Faux*, 2 F. & F. 435, may be referred to as authorities for this proposition.

Having found the fact that the defendant was, at, and for some time before the first of July, tenant of the plaintiff, if we still assume that that contract of tenancy dated only from after the composition, and inquire on what terms did the defendant hold, we are again referred back to the

history of the whole transaction. We are reminded that the defendant began the quarter as tenant at the rent of \$162.50: that if the assignee had held the premises and the estate he would have paid that rent out of the estate; that he gave up the estate, the fund out of which the rent was to be paid, to the defendant; and that not only did the defendant resume possession of the premises and the stock with full knowledge of all the facts, but it was in the defendant's interest and at his instance that every thing was done. Under these circumstances there can be no difficulty in holding that he resumed the premises on the terms that at 1st July he was to pay \$162.50; and that the plaintiff is entitled to a verdict for that amount.

This deduction of the defendant's liability is fully supported by the decisions in *Gibson v. Kirk*, 1 Q. B. 850; *Baker v. Holtpzaffel*, 4 Taunt. 45; *Izon v. Gorton*, 7 Scott 537; *Nation v. Tozer*, 1 C. M. & R. 172; *Ibbs v. Richardson*, 9 A. & E. 849; *Mayor of Thetford v. Tyler*, 8 Q. B. 95; and other cases cited in *Chitty on Contracts*, 182, 183, and 184.

We thus arrive at the liability of the defendant in law as well as in justice, without the necessity of deciding what is the precise effect of the provisions of the Insolvent Acts respecting leases. We could not take up that subject without having to pronounce upon several questions of considerable importance and nicety touching the construction and effect of the Acts as applicable to leaseholds in this Province, which it would be improper for us to decide without a more comprehensive discussion than was considered necessary when this appeal was argued before us; and the case is not of sufficient magnitude to warrant us in asking the parties to reargue it.

It is well, therefore, that we are able to dispose of it on other grounds.

The appeal should be allowed and the rule made absolute to enter a verdict for the plaintiff for \$162.50.

BURTON, J. A., and GALT, J., concurred.

Appeal allowed.

YATES V. GREAT WESTERN R. W. Co.

Patent—Invention—New combination.

The bill was filed to restrain the infringement of a patent. The invention was described as an "improved chair for preventing bolts or nuts used in bracing and joining together iron rails from becoming loose or insecure." This was accomplished by introducing an iron chair between the rails and the sleeper at the joints of the rails, with a raised lip made of such a shape and depth as to be in "constant contact" with the nuts of the bolts after they were placed in position and firmly screwed to the fish-plates and the rails. The patentee claimed as his invention "the lipped chair in combination with the heads or nuts of bolts * * for retaining and preventing the nuts from becoming loose." It was proved that the lipped chair, the fish-plates, the nuts and bolts, had all been used in combination before the issue of the patent; and although not so used for the purposes of the patent, still that result was attained when the nuts happened to be of a larger size and came in contact with the lip.

Held, PATTERSON, J. A. dissenting, reversing the judgment of SPRAGGE, C., 24 Gr. 495, that although a most useful contrivance it could not be subject of a patent, as it was wanting in the element of invention.

THIS was an appeal from the decree of Spragge, C., reported 24 Gr. 495, holding that the patent was valid, and had been infringed by the appellants. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 15th June, 1877. (a)

Bethune, Q. C. for the appellants. It is admitted that all the parts of the patent were old, and had been used in combination long before it issued; it cannot, therefore, be sustained as a combination; but the respondent claims, as the substantial part of the invention, the constant contact of the nuts with the chair. It is submitted, however, that this is not a sufficient combination of known articles to form the subject of a patent, as it is not such a discovery as the Patent Laws were intended to protect. But even if patentable, it should have been found void for prior user, as the evidence shews that the appellants had used nuts flush with the lip of the chair as long ago as 1854. It may be, as is contended by the respondent, that they were not so placed to meet the difficulty which this was intended to overcome, still, if the same result was attained, the

(a) *Present*—BURTON, PATTERSON and MOSS, JJ.A., BLAKE, V. C.

motive with which they were so used can make no difference. In any event this bill cannot be maintained, as the appellants have not used the whole combination, since it appears that the nuts on their rails are kept in position by dutch washers; and then a material part of the patent in question is, that the chair has only one lip, and can be inserted after the rail is down, while the appellants' chair has a lip on either side and has to be slid down from the end of the rail to its place.

He cited *Vance v. Campbell*, Whitman's Patent Cases 9; *Eamers v. Godfrey*, 1 Wallace 78; *Prouty v. Ruggles*, 16 Peters 341; *Gould v. Rees*, 15 Wallace 187; *Cannington v. Nuttall*, L. R. 5 H. L. 205; *Bedford v. Hunt*, 1 Mason 302; *Curtis on Patents*, secs. 328, 329.

J. A. Boyd, Q. C., and *H. McMahon*, Q. C., for the respondent. The authorities place it beyond all question that the invention is patentable, and there can be no doubt as to its utility, as formerly the appellants were obliged to employ large numbers of men in fastening the nuts, which were constantly becoming unwound by the vibration of the trains over the rails. Before Fogg invented this mode of keeping the nuts in their place, the appellants used to put the nuts on after the rail was in the chair—and sometimes where the nut was too large to be screwed on when the chair was in position, the chair was slid up the rail until the nut was put on, when it was returned to its place—and it thus happened that occasionally the lip of the chair and the nut were in contact; but it cannot be held upon such evidence that the patent is void for prior user, as the juxtaposition of the nut and the lip were entirely accidental, and not for the purpose of keeping the nuts tight, which is the object of Fogg's invention. The evidence conclusively establishes that the appellants introduced this invention on their railway after having seen Fogg's model of it. The contention that there has been no infringement because the chair used by the appellants has two lips is untenable, as it is shewn that they have

adopted all the material parts of the patent and merely used the additional lip for strengthening the rails.

They cited *Bovill v. Keyworth*, 7 E. & B. 725; *Allan v. Rawson*, 1 C. B. 551; *Lister v. Leather*, 8 E. & B. 1004; *Newton v. Vaucher*, 6 Ex. 859; *Murray v. Clayton*, L. R. 7 Ch. App. 570; *Harrison v. Anderston Foundry Co.*, 1 App. Cas. 574; *Cannington v. Nuttall*, L. R. 5 H. L. 205; *Daw v. Eley*, L. R. 3 Eq. 496.

December 17th, 1877 (a). MOSS, C. J. A.—The object of this suit is to restrain the infringement of a patent, of which the plaintiff is the assignee. In the bill the invention is described as an improved chair for preventing bolts or nuts used in bracing and joining together iron rails from becoming loose or insecure.

The relief sought is, that the defendants may be restrained from using a chair after the pattern of the chair, to the use of which the plaintiff is entitled by virtue of the letters-patent, and may be ordered to pay damages and account for profits. The defendants contend *inter alia* that the alleged invention was not the proper subject of a patent. In the specifications the object of the invention is stated to be to prevent bolts or nuts from becoming slack or loose in their places after they are applied and in use in connection with iron or wooden plates, or straps used for joining together the iron rails in use on railways and for other purposes. It is further stated that this is accomplished by introducing the iron chair of the form and shape shewn in the accompanying figures, between the iron rail and the sleepers at the joints of the rails, and that the chair is constructed with a raised edge or lip extending over a part or the whole length of its surface, and that this lip is formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts after they are placed in position and firmly screwed to the straps and rails. The specifications referring to the drawings also state that it will be seen that the upper portion of the chair forms a seat

(a) *Present*—MOSS, C. J. A., BURTON and PATTERSON, J. J. A., BLAKE, V. C.

or cheek for receiving the sides of the nuts or heads of the bolts, which will entirely prevent the bolts from "working loose" or dropping out of their places from the vibration of vehicles passing over the rails, or from other causes. The patentee claims as his invention the lipped chair in combination with the heads or nuts of the bolts as applied, described and shown in the figures for the purpose set forth, for retaining and preventing bolts or nuts from becoming loose or insecure in their places, after being applied and attached to the fish plates or straps for joining and connecting together iron rails used on railways. The decree which is appealed against establishes the validity of the patent, and awards an injunction restraining the defendants from using the "patented invention."

It is shewn that chairs and fish plates had both been used in connection with the fastening and tightening of rails. The chairs were first used, and upon the introduction of the iron bands, called fish plates, they were abandoned; but as it was found that the rails then cut the ties, the use of chairs was resumed.

The plates were laid along the rails at the point of junction of each two, and were fastened by bolts which passed through the rail, the head of the bolt being on one side, and a screw, with a square nut, being on the other. It appears also that chairs were made with a lip similar to that mentioned in the patent. Thus, the lipped chair, the fish plate, and the bolt, with a nut at the end, had all been used in combination before the issue of the patent. Any patent granted for a mere combination of these could not possibly have been sustained.

In actual work, it was found that the great vibration attending the passing of heavy trains on the rails had a strong tendency to wear away the thread of the screw, and to loosen the nut. When the nut became unwound, the fish plates did not remain closely pressed against the rail, and the joint was imperfect. This was constantly happening and occasioned great trouble and expense; workmen had to be employed for the very purpose of looking after and

fastening the nuts, which had become unwound, and been thrown off. The attention of railway engineers had undoubtedly been directed to the subject of overcoming this defect. His lordship, the Chancellor, has clearly pointed this out in his judgment: "The desideratum was to find some mechanical contrivance by which the unwinding of the nut from the screw should be prevented. There was no novelty in the combination of rail chairs and fish plates, nor in the latter being bolted together, and the bolts being fastened by a head on the one side and a nut and screw on the other. The nut becoming loose on the screw and working off was the difficulty to be remedied, and the inventor very properly has confined his application for a patent only to his apparatus for remedying that difficulty." I think that the learned Chancellor has accurately described the existing state of things, the difficulty which was experienced, and the object which the patentee desired to accomplish.

This object was of much importance, and any contrivance which effected it satisfactorily would undoubtedly be useful. To the plaintiff belongs the credit of suggesting a method by which the end of keeping the nut in its place could be attained; and its great utility is established not merely by argument, but by a great body of testimony. What then is this method? Was it the invention of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement therein, within the scope and meaning of the Patent Laws?

I do not think that this question can be answered in the plaintiff's favour.

I cannot see that there is any invention of the kind contemplated by those laws. The patentee does not suggest any new mechanical contrivance, by which this object is to be effected. He does not substitute anything for the chair, or the fish plate, or the bolt, or the screw. He does not even make any change in the shape of these objects. If his claim were to be read strictly, the patent manifestly could not be sustained, for he would seem by it to endeavour to appropriate the combination of the lipped chair with the

heads or nuts of the bolts. But I am not disposed to apply any severely critical rule of interpretation to the prejudice of the plaintiff. I am willing to concede that what he claims is the principle of contact, or close proximity between the nut and the lip of the chair.

I am quite prepared to adopt the description of this contrivance given in the judgment of the Court below, namely, that it is to make the chair with an edge or lip carried up to a sufficient height to meet the square head of the nut, so that the sides should be in contact, or at least so nearly in contact as to prevent the nut turning on the screw. As the learned Judge well remarks: "The upper edge of the lip being square, and the head of the nut also square, it is obvious that if a side, not a corner, of the head of the nut be, or be nearly, in close contact with the lip of the chair, the nut can turn but little, and the closer and more accurate the contact, the less must be the turning of the nut, and the more perfect the remedy for the evil to be met." It is indeed obvious, so obvious that one can only wonder that it was so long in being observed.

Here were railway engineers seeing rails placed upon chairs, lips on the chairs, fish plates on the rails, and bolts with nuts through them. The nuts were constantly turning around and coming off, to their annoyance. Yet it did not occur to any of them, obvious though it now is, that if one of the sides of the square nut were placed in contact with the flat upper surface of the lip, the nut would not turn. Its mere obviousness would not be a reason for refusing it protection, if the other elements of a good patent existed. The observations of Lord Justice James in *Murray v. Clayton*, L. R. 7 Ch. App. 570, are sufficient to dispose of that point. But the difficulty which appears to be insuperable is that there is no invention. When analyzed, the proceeding of the patentee amounts to no more than this: He points out the old well-known contrivance of lipped chair, fish plate, and bolts with nuts, and he announces the self-evident truth that if, and whenever, the side of the nut is placed along and in contact with the surface of the lip, the nut will not turn.

No doubt wherever his suggestion is adopted, there follows the accomplishment of the object which had been desired. No doubt his attracting attention to this truth was of value to railway proprietors. No doubt his idea has been fruitful in good results. But all this is of no avail without something in the nature of invention, and of that I perceive no trace. Before he had announced the proposition or axiom, that the nut will not turn if its side be placed in contact with the lip, the result had been in fact achieved by precisely the same means. It had happened that the lip was so high and the nut so large, that the one nearly rested upon the other. Wherever this had happened, the bolt was kept from "working loose" or dropping out of its place. The plaintiff's merit consists in his having pointed out that this was the result of proximity. But surely this does not entitle him to restrain any one from using nuts and lipped chairs, unless the edges are kept at some distance from each other.

While it is not disputed that a new combination, if it produces new and useful results, is patentable, although the constituent parts of the combination were already in common use, I think it is correctly contended that the results must be a product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined results. It has been held by the Supreme Court of the United States, (*Hailes v. Van Wormer*, 20 Wallace 533,) that merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention.

I cannot but think that the non-patentable character of this so-called invention becomes more apparent, when an attempt is made to define practically what will amount to an infringement of the patent. The invention is said to be that of contact between the lip and the nuts. The specifications, indeed, speak of "constant contact," but I apprehend that that should not be construed to mean absolute contact between all the points of the two surfaces. This language must be understood in its ordinary popular sense, and not construed as it would be in a mathematical definition.

The judgment of the House of Lords in *Clark v. Adie*, 37 L. T. N. S. 1, where the term "parallel" was under consideration, lays down the true principle of construction.

But construing the patent in this way, the question still is, when can this principle of "contact" be fairly said to be infringed? What distance must be kept between the edge of the chair and the edge of the nut, in order to avoid trespassing upon the plaintiff's rights? If these two surfaces were originally placed as wide apart as the thickness of a sheet of paper, would there be an infringement? Would there be the constant contact of which the patentee claims a monopoly? If placing them in that position originally was not an invasion of the plaintiff's rights, could he complain if it happened, as I apprehend it would be certain to happen, from the working of the screw that the edge of the screw rested on the lip of the chair? I do not think that any such contention could successfully be made.

I have examined the cases referred to in the argument, as well as those commented upon by his Lordship in pronouncing judgment; and I must confess that they do not appear to me to support the plaintiff's contention. I express this opinion with unfeigned diffidence of its correctness, both because the learned Chancellor reads the cases differently, and because my brother Patterson, as I understand, concurs in that view. But a careful reperusal of these authorities has satisfied me that I cannot arrive at the same conclusion. *Schuster v. McKellar*, 7 E. & B. 725, which is treated as applicable to this case, decides no more than that a new combination may be the subject of a patent. But I have already pointed out that this patent is not rested upon its being a combination. If that were the claim, the patent would unquestionably be invalid, because the combination of nuts and lipped chairs had actually been used in connection with the securing of rails. It is quite clear that the patent can only be supported on the ground that combination is to be read as "contact." In *Schuster v. McKellar*, the patent was for a blast and an exhaust applied to the working of a mill. Both blast and exhaust had previously been used separately

in working mills, but they had not been used in combination, and it was their use in combination which was held entitled to protection.

In *Sellers v. Dickenson*, 5 Ex. 312, there was clearly the introduction of novel mechanism for effecting the object desired, namely, the instantaneous stoppage of the working parts of a loom, whenever the shuttle stops in the shed. The inventor in that case did not simply point out that if some parts of the old machinery were placed together, a certain result would follow. He introduced a new piece of mechanism. I refer particularly to the language of Rolfe, B., where he lays special stress upon the introduction of what he terms a new element altogether, viz., a break, which at the same time that the machinery is put out of gear, has the effect of stopping the fly-wheel.

So in *Newton v. Grand Junction R. W Co*, reported in the same volume, p. 331, the invention consisted in the lining of boxes for axle trees with an alloy of tin, having certain provisions partly mechanical and partly chemical, for keeping the lining in its place. It consisted of old and well-known parts in combination with new parts, and the real question decided was that a patent will be valid, though it may in part consist of old parts, provided the patentee does not claim the old parts, but only the combination of them and the new.

The same patent came under consideration in *Newton v. Vaughan*, 6 Ex. 859, and was supported against a patent of earlier date, on the ground that it was for the discovery not merely of a new principle, but a new principle embodied in a new machine. When this conclusion in fact was reached, the conclusion in law was manifest.

In *Smith v. London and North Western R. W. Co.*, 6 E. & B. 405, the question of novelty or sufficiency of invention was not really touched, the complaint against the verdict being that there was no infringement.

I think that *Neilson v. Harford*, 8 M. & W., 806, is quite consistent with the view I take of this case. There invention of an unmistakable character was found. The patentee had

not simply stated that if certain well-known devices were brought into juxtaposition a certain result would follow, but had invented an apparatus for applying to a useful purpose a well-known principle. The language of Parke, B., who delivered the judgment of the Court makes this clear. He said, "We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces." It would have been strange indeed if that had not been deemed invention in the most proper sense of the term. It may be noted also, that the question arose upon the sufficiency of the language used by the plaintiff in his specifications.

I need scarcely say that I am not assuming to differ from the authorities which establish that the simplicity or apparent obviousness of an invention is no objection to its being patented. If there had been anything that according to my notion partook of the nature of true invention, I should have been glad to support this patent. If experiment had been required to establish that the named result would follow from the juxtaposition of the lip and nut, the case of the *Electric Telegraph Co. v. Brett*, 10 C. B. 838 might have assisted the plaintiff's contention, but there is no ground for that supposition. In *Cannington v. Nuttall*, L. R. 5 H. L., 205, which was much relied upon by the respondent, it seems to me to be either explicitly or impliedly indicated by each of the Law Lords, that in such a case there must be the invention of some apparatus for bringing into action a natural force or property.

Without pursuing further an investigation of the cases, I content myself with saying that I have not seen one in which any claim resembling this either in letter or substance, has been sustained. To pronounce this valid would, in my opinion, not be in accordance with the language of the Statute, or the spirit in which the Patent laws has been administered by the Courts.

The Courts have long since abandoned the notion that patents should be construed strictly as an abridgment of

common and public right. They have more and more recognized the principle that it is to the advantage of the State to encourage ingenious and skilful men to devote their time and talents to the invention of improvements in arts and manufactures, and are therefore in the habit at the present day of construing patents in a liberal and benignant spirit, so as to secure to the true inventor the fruits of his labour, skill, and thought.

But they have not made the presence of real invention less essential than it ever was. This element I cannot perceive in the plaintiff's claim, and I think therefore that, however useful or meritorious, it was not the subject matter of a patent.

The appeal should be allowed, with costs, and the bill dismissed with costs.

BURTON, J. A.—The patent for the alleged infringement of which by the defendants this suit was instituted purports to be granted to one Fogg, for what is described in the patent "as an improved chair for preventing bolts or nuts used in bracing or joining together iron rails from becoming loose and insecure," which, it is further stated, consists in the lipped chair in combination with the heads or nuts of bolts. And in the specification he describes the chair as constructed with a raised edge or lip, and extending over a part or the whole length of its surface, formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts after they are placed in position and firmly screwed to the straps and rails, as shewn on the plan.

And what the inventor claims as his invention is the lipped chair in combination with the heads or nuts of the bolts as applied and shewn on the plan for retaining and preventing the nuts from becoming loose.

The rails meet but-end to but-end, and the weight of the engines has a tendency to depress the rail on which it rests below that to which it is approaching, and various expedients appear to have been resorted to to counteract this tendency

by means either of chairs or fish plates, or both. The chair appears to have been first used alone, but not succeeding, the fish plates were substituted, but the ends of the rails then coming directly in contact with the sleepers cut into them, and finally the chairs and fish plates were used in combination, the fish plates being attached to the side of the rails by means of nuts and bolts.

All these were so used in combination long before the date of the application for the patent under which the plaintiff claims. There was always a raised lip in the chair, for the purpose no doubt of keeping the ends of the two rails in the same line, but varying in size, so that if the nuts used with the bolts happened to be of a large size they would come in contact with the upper surface of the lip.

The problem to be solved was how to prevent the nuts from becoming unscrewed, and it is astonishing that so simple a contrivance as was pointed out by the plaintiff should have escaped the attention of practical men accustomed to the working of railways, and to whom this previous inconvenience had been a constant source of annoyance and expense. That the suggestion of the plan which the plaintiff has attempted to patent was one of great value to the defendants cannot admit of a doubt, and whether patentable or not should, one would suppose, have entitled him to a handsome compensation at their hands; but whether he is entitled to enforce compensation for the past and restrict their use for the future must depend upon the validity of the patent.

The plaintiff cannot and does not pretend to claim a right under the patent to manufacture a chair with a peculiar lip, but merely this combination of the lip with the nuts, in other words, placing the lip in such a position that one of the square sides of the nut will face or lie upon it, and thus produce a certain effect. But it was no new discovery that if one of the square surfaces or sides of a nut were placed in contact with the even surface of another body, which was fixed in its place, there would be no possibility of the nut turning on the bolt; that would be a self-evident truth, a

knowledge and discovery which the world was all the time in possession of. It is quite true that, singularly enough, this simple contrivance did not suggest itself to anyone, but it was no invention, and does not come within the letter or spirit of the statute which refers to any new and useful art machine, manufacture, or composition of matter, or any improvement on either of them.

Mechanical and chemical discoveries all come within the description of manufacture, and it is no objection to either of them that articles of which they are composed were known and were in use before, provided the compound article which is the object of the invention is new. I speak with great diffidence upon a matter which may appear to involve some knowledge of mechanics, especially as the learned Chancellor and one of my learned brothers have arrived at the conclusion that what is claimed here is a fit subject matter for a patent, and I may say that, almost with regret, I have been unable to bring myself to the same conclusion, feeling that in justice the plaintiff is entitled to be compensated.

How would it be proposed to enjoin the defendants. Can it be claimed that they have not a right to make chairs with lips or edges such as are spoken of here, or that they can be limited as to the size, or that they are not entitled to use nuts of any size that they think proper. Surely there can be no pretence for either proposition, and it would amount almost to a *reductio ad absurdum* to say that they are bound to leave the nuts when in position so that one of the sides should not be parallel to the face of the lips. The plaintiff has no vested right in that, and it is only necessary, I think, to consider how such an injunction should be framed to shew how perfectly untenable is the plaintiff's claim.

For these reasons I think that the appeal should be allowed, with costs.

PATTERSON, J. A.—The defendants appeal from a judgment of the Chancellor of Ontario, holding that the patent in

question is valid, and that it has been infringed by the defendants.

The judgment is impugned on both points. The validity of the patent is disputed on the grounds of want of novelty; that all the separate parts of the matter covered by the patent were old; that the invention is not such a combination of known articles as to form the subject of a patent; that the patent for the combination cannot be supported, because parts of the same combination were used in combination before the date of the patent; and that the patent is not for the combination.

The infringement is denied generally, and it is at the same time contended that the whole combination has not been used, and that therefore, even if the combination is patentable, the plaintiff cannot maintain his bill.

The evidence seems to shew, with reasonable freedom from doubt, all the important facts.

It appears that the defendants had used the chairs and the fish plates—first the chairs alone, then the fish plates alone, and then both chair and fish plate—in order to make the joinings of the rails solid and smooth. It appears that the mode of operation was to screw the nuts on the bolts which fastened the fish plates to the rails, while the rail rested on the chair; and that the idea of first screwing up the nuts and then sliding the chair under the joint, having the raised lip of the chair of such size as to fit close up to the nuts, and so prevent the nuts from turning, was an original idea of the patentee.

The utmost length to which the evidence of previous user seemed to go, is to shew that sometimes, by reason of a nut being of unusual size, it could not be turned while the chair was in its place, and the chair had to be knocked to one side, and then driven back when the nut was screwed up. The evidence about this is not very clear, but there is nothing to shew that the principle of using the chair as a stay to keep the nuts tight was ever adopted or even thought of by those in charge of the defendants' railway until after

the patent, and there is direct evidence, as pointed out by the learned Chancellor, that the defendants took the idea from a model of the patented arrangement.

I agree with the finding in favour of the novelty of the invention.

Its utility is beyond question.

It is also, in my opinion, a fit subject for a patent.

In *Penn v. Bibby*, L. R. 2 Ch. App. 127, Lord Chelmsford suggests (at p. 136), as a test of novelty, whether the new application lies so much out of the track of the former use as not naturally to suggest itself to a person turning his mind to the subject. This applies in the present case. The former use of the lipped chair was merely to support and strengthen the joint. It had long been a desideratum to find some mode of keeping the nuts and bolts from turning. Various schemes had been tried; yet this contrivance, simple as it seems, was so much out of the track of the former use as not naturally to have suggested itself to any of those persons whose minds had been turned to the subject. The important invention which was in question in *Penn v. Bibby*, viz., the use of wood in the bearings of the propelling screws of steam vessels in place of metal, was an application of a contrivance which was already used with grindstones and water-wheels, yet it was held to be a proper subject for a patent.

Newton v. Vaucher, 6 Ex. 859, affords another example very much in point. The head note states the point very clearly: "A obtained a patent for an improvement in packing hydraulic and other machines, by means of a lining of soft metal, and thereby rendering certain parts of such machines air and fluid tight. B afterwards discovered that soft metal had the property of diminishing friction, and of preventing the evolution of heat, when applied to the surfaces in contact of machines in rapid motion and subject to pressure, and he embodied the application of that discovery to machines in a patent. Held, that the application of the soft metal by B differed essentially from that of A, and that B's patent was new."

The learned Chancellor has in his judgment referred to *Bovill v. Keyworth*, 7 E. & B. 725; and to *Murray v. Clayton*, L. R. 7 Ch. App. 570, which are also strong authorities in the plaintiffs favour.

Then, the invention being new and useful, and the proper subject for a patent, has it been patented?

The specification is in these words:—

“The object of my invention is to prevent bolts or nuts from becoming slack or loose in their places after they are applied and in use in connection with iron or wooden plates or straps used for joining together the iron rails now in use on railways, and for other purposes.

“This is accomplished by introducing the iron chair A, of the form and shape shown in figures 1, 2, and 3, between the iron rail B and the sleeper C at the joints of the rails.

“The chair is constructed with a raised edge or lip, and extending over a part or the whole length of its surface. This lip is formed and made of a suitable shape and depth, so as to be in constant contact with the heads or nuts of the bolts D after they are placed in position and firmly screwed to the straps and rails, as shewn.

“It will be seen that the upper portion of the chair at E forms a seat or cheek for receiving the sides of the nuts or heads of the bolts, and which will entirely prevent the bolts from ‘working loose’ or dropping out of their places from the vibration of the vehicles passing over the rails, or from other causes.

“CLAIM.—What I therefore claim as my invention is the lipped chair A in combination with the heads or nuts of the bolts D, as applied described and shown in figures 1, 2, and 3, for the purpose set forth, for retaining and preventing bolts or nuts from becoming loose or insecure in their places after being applied and attached to the fish-plates or straps for joining and connecting together iron rails used on railways or tramroads, as described and shewn in the accompanying drawing and specification.”

A good deal of the argument for the appellants has been based on the assumption that the patent is for a combination.

of mechanical contrivances, each one of which is old; and that ground is advanced in the printed grounds of appeal.

It is not correct to describe the patent as for a combination. It is true that the word combination is used. The invention is claimed to be the lipped chair in combination with the heads or nuts of the bolts; but the meaning is obviously to state the contact of the lip with the nut as the novel feature. *Combination* must be read as meaning *contact*, which is the word employed in the earlier part of the specification. The nut has no active part to perform. It is the object to be acted upon. It is to be secured by contact with the lip. The shape or size of the nut forms no feature of the patent. No doubt it is treated as being square, which is the common shape in such positions. The size is left unspecified. But, given the size of the nut in use, or rather its height above the sleeper, the invention is the making of the chair with a lip of suitable shape and depth to be in constant contact with it.

I think there can be no doubt that the specification is sufficient, and that the invention is covered by the patent.

There remains only the question of the infringement.

It is clearly shewn by several witnesses that after the adoption of steel rails, which was in 1863 or 1869, the defendants had chairs made on the principle of the patent for the purpose of keeping the nuts from turning.

Mr. Weatherston states, that the first nuts that came out were of the precise size and fitted up close to the lip of the chair, and that some of these are used until now; and Mr. Biggar, the Civil Engineer, states that he has seen the arrangement in use, that is the nuts square on the top of the plate, up to within a week of the hearing. There was plainly evidence to support the finding in this particular.

It is urged, however, that an essential object of the invention is to prevent the nuts or bolts becoming loose or slack, and that juxtaposition must be shewn before it can be said that the patent has been infringed, whereas the witnesses generally say that, although the plates used by the defendants will prevent the nuts turning round, and so prevent

their actually working off the bolt, yet they do not prevent a partial turning and consequent slackening of the bolt and wearing of the thread. It is not necessary to say more as to this, than that the evidence of Mr. Weatherston and Mr. Biggar, without considering that of the other witnesses, is amply sufficient to shew an infringement even on this strict reading of the specification. In saying this, I must not be understood as expressing an opinion that the patent must necessarily be read so strictly; or that the opinion expressed by the plaintiff in his evidence, that the patent applies to prevent the adaptation of the chair to keep the nut from turning, even though it may not fit tight, is not well founded. It was further urged that the defendants had not used the form of chair described in the specification, which is a chair with one lip only, so made in order to slide under the rail after the bolts are fixed, the lip admitting the flange on one side of the rail, and the opposite side being fastened by spikes passing through the flange of the rail and through the chair. The chair used by the defendants has a lip on each side. It cannot be put in its place from the side of the rail like one of the flat form mentioned in the specifications, but must be fitted on at the end of the rail and driven down the rail to its place. The object of the second lip, which is the same as in the old form of chair, is explained to be to give greater strength and firmness to the joint than the spikes alone can afford—and it has no reference to the securing of the nuts.

We have been referred to several American cases in which it has been decided that when a patent is granted for a combination of mechanical powers or a combination of ingredients, which produce a certain result, there can be no infringement unless the whole combination is used; and to the case of *Harrison v. Anderston Foundry Co.*, L. R. 1 App. Cas. 574, in which (at p. 578), the same doctrine is enunciated by Lord Cairns. That doctrine does not apply here, for two reasons: first, because, as I have shown, this is not a patent for a combination; and secondly, because the defendants do not say that they effect the result

with a part only of the combined subjects ; they shew an addition to them in place of a dispensation with any one of them—and that addition being one which has no reference whatever to the object of the patent.

In this case the adaptation of the chair was new, and it was the material part of the invention. Even if the invention could properly be called a combination, the infringement would be established. In *Lister v. Leather*, 8 E. & B. 1004, it was held both in the Queen's Bench and Exchequer Chamber, that the use of a subordinate part only of a combination may be an infringement of a patent for a combination, if the part so used be new and material.

In that case Lord Campbell refers to several decisions which very directly support the plaintiff's contention in the present case, viz.: *Sellers v. Dickinson*, 5 Ex. 312 ; *Smith v. London and North Western Ry. Co.*, 2 E. & B. 69, and *Newton v. Grand Junction Ry. Co.*, 5 Ex. 331.

I am of opinion that the appeal should be dismissed, with costs.

BLAKE, V. C.—I have read the evidence in this case several times, and on the best consideration I can give it. I am unable to come to the conclusion that it warrants a decree in favour of the plaintiff.

Long before the plaintiff applied for a patent, there were in use on railways the "lipped chairs," "fish plates," and "heads or nuts" to secure them. These "heads or nuts" were of various sizes, as were also the "lips" on the "chairs," and the nuts were found some times in contact with the lip, some times at such a distance as that the nut would partially revolve, and some times so that the nut would revolve entirely without touching the lip. Thomas Fogg in his examination says : "Everything was used as it is now, except that the chair and fish plates were not combined." John Weatherston, who was for a time inspector on the defendant's road, says in answer to the question : "Did not some of the nuts fasten tight on that chair ? Some of them did. And others did not ? Yes.

So when this fastened tight it does all that that does? Well, it does; it fastens one bolt. And if you choose to make the bolts a little nearer, it would fasten both? Yes. And that was in 1856? Yes." In Kitching's evidence in answer to the question, "Then the intention was to get bolts that would fit close to the lip so that they would not turn round; and you say the first lot of bolts did accomplish that?" He answered, "Yes." Again, "You suggested getting the lip of the chair high enough to keep the nuts from turning round? Yes, if he adopted the chair. That was in 1858? Yes. My learned friend has asked you if any of the nuts fitted close up? I saw some coming under quite square and others did not; I would see one quite close on the square, and the next one would turn round a little. And you recollect seeing some that were quite close in fitting to the lip of the chair? Yes, when the nut was turned square."

The chair with the lip, the fish plates, the nuts, were all in use on the defendants' railway long before the patent in question was issued. At times the nut was brought into contact with the lip, and those interested in the matter sought to have the nut thus placed, in order to prevent the result which is sought to be obviated by the plaintiff's patent. I do not see in this case any exercise of that faculty which it is intended to reward and protect by the patent laws. In *Ralston v. Smith*, 11 H. L. 241, the Lord Chancellor thus describes the process, in respect of which it was sought to sustain the patent: "What, therefore, the plaintiff has done has been to take a particular pattern out of the infinite number of patterns that might be engraved upon the roller, and to use that particular pattern alone for the purpose of impressing the fabric of the cloth with that pattern, and also at the same time giving it a brilliant gloss or finish." As to this, Lord Cranworth says at p. 251: "But I quite agree with what was said by Mr. Grove, and it could not possibly be disputed by any gentleman at the bar, that it is not every useful discovery that can be made the subject of a patent." And in the same case, Lord

Chelmsford says, at p. 256: "What invention was there in all this? The plaintiff does not claim to have invented any new combination of machinery, although by part of the title of his patent, which he afterwards disclaimed, he appears originally to have considered that he was an inventor in this sense; nor has he introduced to the world any new process; but the utmost that he can lay claim to is, that he has discovered that by giving a differential motion to different parts of an old machine, a power existing in it might be developed and brought into action. It appears to me that such a discovery is not the subject of a patent." What is sought to be protected by a patent in the present case appears to me to be no more than that which is thus described by Lord Justice James, in *Patterson v. Gaslight and Coke Co.*, L. R. 2 Ch. Div. p. 833, "This is a very valuable working caution and direction, but it is impossible to make anything more of it, than a working caution and direction." * * * It may be a direction and instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent."

In the present case those engaged in working this department of the railway at once saw the advantage of having the nut in contact with the lip. It was mentioned to the engineer of the railway. The reason for having this contact was known, and it was because they saw that the nuts thus placed did not wear, that it was discussed as a matter to be seen to. The railway did not determine to introduce this general system until it determined to relay the track, when it adopted that which, in my opinion, it was perfectly justified in doing, the nut in contact with the lip. It would have been incomprehensible if men employed in the practical working and repair of the track from day to day had failed to see that, patent to all eyes, and to my mind, just because so plain to all eyes, not a subject of a patent. I think the evidence in the present case, shews there was no discovery or invention on the part of the plaintiff; that he

merely adopted that which from time to time might have been seen in the yard of the defendants; but apart from this, I do not think the plaintiff can patent the distance at which the combination in question can be used, and the defendants, whether they had used or not the lip in contact with the nut, were always at liberty, as they are now at liberty to use it in such manner as they deem the same will most effectually carry out the object they have in view. I think the appeal should be allowed, and the bill be dismissed with costs.

Appeal allowed.

O'CONNOR ET AL. V. DUNN.

Evidence—Notes of deceased surveyor—Admissibility of.

Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters, private and professional, were tendered in evidence to prove the boundary between lots 3 and 4. The entry of the survey was as follows: 6th June, 1827.—Got Mr. Ashbridge to shew the stake between Nos. 3 and 4 &c. And in another part of the book the following entry appeared:

June 15, 1827.—D. Bolton, Esq.....	£2 16 3
At D. Bolton's house for fence.....	0 4 0

£3 0 3 pd.

There was no evidence that at or about the time of the survey Boulton had any interest in either lot 3 or 4; but it was shewn that he obtained a conveyance of lot 2 two months afterwards, and of lot 3 in 1830. Surveyors were not at that time under any obligation to make notes of surveys; and it was not proved that the entry was made contemporaneously with the transaction.

Held, reversing the judgment of the Queen's Bench 39 U. C. R. 597, that the entry was not admissible as one made in the course of business, or in the performance of a *quasi* public duty.

Held, also, that the notes of the survey were not sufficiently connected with the entry of payment to be read with it as an entry against interest.

Per MOSS. C. J. A., and HAGARTY, C. J. C. P., that the evidence would not have proved anything material to the controversy; and

Semble, *per* HAGARTY, C. J. C. P., that the evidence would not have affected the result, and that the better course, therefore, would have been, even if the Court thought the entries admissible, to have refused a new trial for their rejection under sec. 34 of the A. J. Act, 1874.

THIS was an appeal from the Court of Queen's Bench, making absolute a rule nisi for a new trial, on the ground that certain notes of a survey had been wrongly rejected,

reported 39 U. C. R. 597. The facts are fully stated there, and in the judgments on this appeal.

The case was argued on the 5th September, 1877 (a).

M. C. Cameron, Q. C., J. H. Ferguson with him, for the appellants. The Court below were satisfied with the verdict upon the merits, but granted a new trial on the ground that the notes of a survey made by the late Mr. Gibson had been improperly rejected. They held that these notes should have been admitted as having been made for a person interested in the property, and in the discharge of a quasi public duty. The notes, however, were properly rejected at the trial, as the evidence merely shews that Gibson ran a line between lots 3 and 4, in June, 1827, and that lot 3 was conveyed to Boulton in 1830, which is not sufficient to justify the inference that Boulton was interested in the property in 1827. It does not appear that these entries were made as a part of the duty of the person making them, nor that they were made contemporaneously with the fact they narrate, nor that they were made by a person who was acquainted with the fact. They are merely evidence of the opinion of the surveyor of the existence of an original post, but they cannot be considered evidence of the fact. Nor can the notes of the survey be admitted on the ground that they were connected with the entry against the declarant's pecuniary interest, as they were not contained in the entry against interest, nor necessary to explain it. The notes do not appear to relate to the existence of an original monument between these lots, and a new trial should not have been granted for the exclusion of such evidence. It is plain that there was no undisputed monument between the lots in question, and the boundary was therefore properly ascertained in accordance with C. S. U. C. c. 93, sec. 33, by making a division of the several lots between the nearest undisputed monuments. They referred to *Doe v. Larkin*,

(a) *Present*.—MOSS, C. J. A., HAGARTY, C. J. C. P., BURTON, J. A., and BLAKE, V. C.

6 C. & P. 481; *O'Connor v. Dunn*, 37 U. C. R. 430; *Campbell v. Hill*, 23 C. P. 473.

McCarthy, Q. C., with him *W. A. Foster*, for the respondent. The notes of the survey should have been received as they were officially made by Gibson in the performance of a public duty in settling the bounds of the lots. Everything was proved to entitle us to use them. It was shewn that the entry was made in the usual course of business by a person whose duty it was to make the whole of it, and who was personally cognizant of the fact alleged: that he had no interest in stating an untruth: the death of the party: and that it was made contemporaneously with the fact which it narrates. The latter fact is fully established by the position of the entry in the book. Boulton's interest in the property at the time of the arrangement is unquestionable, as he got a deed of lot 2 two months afterwards, and of lot 3 in 1830. It is therefore only fair to presume that he was negotiating for the purchase of these lots at the time. It is not likely that he would have had the survey made, or paid for it, if he had not been interested in the property. The notes were undoubtedly admissible as an entry against pecuniary interest. It makes no difference that the entries were in different parts of the book, as it is apparent that the payment relates to the survey. At all events it should have been left to the jury to say whether the survey on the 6th June, 1827, was not that charged for in the second entry. The entry was also admissible as evidence of reputation of a matter of public and general interest, notwithstanding the fact that such evidence relates to a matter of private interest, inasmuch as on the question of the position of the monument between lots 2 and 3 depends the location of the side lines between 5 and 6, and other matters of public and general interest. It is apparent that the entry in the notes relates to the matter in issue between the parties, because no original monument was placed to define the limits between the lots in question, owing to the fact that the township is bounded in front by Lake Ontario, and no posts or

other boundaries were planted in the original survey on the bank of such lake to regulate the width in front of the lots, and therefore the sidelines of the lots have to be drawn from the posts or other boundaries on the concession line in rear thereof, which the said entry in fact relates to. They referred to *Doe v. Turford*, 3 B. & Ad. 890; *Chambers v. Bernasconi*, 4 Tyr. 530; *Poole v. Dicas*, 1 Bing. N.C. 649; *Stapylton v. Clough*, 2 E. & B. 933; *Regina v. Inhabitants of Bedfordshire*, 4 E. & B. 535; *Eastern Union Railway Co. v. Symonds*, 5 Ex. 237; *Hunt on Boundaries*, 186; *Taylor on Evidence*, 35-40, 7th ed.; *Greenleaf on Evidence* 140; *Higham v. Ridgway*, 2 Smith's L. C. 318, 7th ed., 32 Vic. c. 38, sec. 3, O.; 59 Geo. III., c. 14, sec. 5.

December, 17th, 1877 (a). Moss, C. J. A.—After the judgment of the Court of Queen's Bench, reported in 37 U. C. R. 430, this case was tried a second time, and a verdict again found by the jury for the plaintiffs. A rule *nisi* was obtained on behalf of the defendant for a new trial on the ground of the rejection of evidence of entries made by the late David Gibson, P. L. S. of the survey made by him, and of the posts found by him on the making of such survey between lots 3 and 4, and on various grounds of misdirection. The Court was not dissatisfied with the verdict upon the merits, and it declined to disturb it on any of the alleged grounds of misdirection; but a new trial was reluctantly ordered on account of the exclusion of the evidence. We concur in the opinion that no reason is shewn upon the merits for interfering with the verdict, which two juries have found; and we are also unable to perceive any misdirection by the learned Judge. The question for our consideration is, therefore, narrowed to the effect of the exclusion of the evidence.

The entries in question are contained in a book kept by David Gibson, a P. L. S., who died in 1864. The book was produced by his son, who is also a surveyor, and whose evi-

(a) *Present*.—MOSS, C. J. A., HAGARTY, C. J. C. P., BURTON, J. A., and BLAKE, V. C.

dence, upon which it was proposed to read the notes, is as follows: "My father kept notes of his survey; I have some of his books; I surveyed with him all my life till 1864; he always kept notes from the time he came to Canada in 1826; there are notes of his running on 6th June, 1827, between 3-4; it seems to have been run for D. Bolton by his account in the same book charging D. Bolton in June, 1827, £2 16s. 3d.; for a survey; on 27th June, 1827, he appears to have surveyed for C. C. Small the fronts of lots." When the book is examined, it appears to be a sort of diary in which Mr. Gibson was in the habit of writing from day to day various topics in which he took an interest and likewise to contain entries headed, "Surveying Account." It bears no resemblance to a book of field notes, ordinarily so called. The first entry which it is desired to read occurs under the heading of June, 1827, and is as follows:

"6. Wednesday. Got Mr. Ashbridge to shew the stake between Nos. 3 and 4, in 1st concession, then measured to the east side of No. 1, found 117 links narrow, each lot 19 x 61. Then run between 3 and 4, and measured 19x61 at rear and run east line back, came 10 links east of stake, and run the broken front to the lake from the same stakes at lot No. 3."

He makes some entry in relation to each of the preceding and subsequent days of the month, down to the 12th. For example, he notes that on Sunday, the 3rd, he was at A. Milne's; that on Monday, the 4th, he came to York, and saw the general training, and went to Mr. Readman's; that on Thursday, the 7th, he met a Mr. Cameron, who gave him a bond under a penalty of £50 for 200 acres of land. With regard to Sunday, the 10th, he writes: "Meeting held in A. Milne's. Armstrong, and an Irishman fresh from Ireland."

The entry, under the head of surveying account, is :
June 15, 1827, D. Bolton, Esq.....£2 16s. 3d.

" At D. Bolton's house, for fence ... 4s.

£3 0s. 3d. pd..

It is obvious that this memorandum, even if admissible *quantum valeat* as an entry against interest by a deceased person, of itself proves nothing material in this controversy..

It only shews that Mr. Gibson had some charges against Mr. Boulton, which may fairly be inferred to have been for his services as a surveyor; although there is no independent evidence of the fact that he did perform such services for Mr. Boulton.

But it is clear that if the document is admissible, it cannot be accepted as proof of independent matters, unconnected with the entry against interest, and which need not be read in order to its explanation. In *Doe v. Bevis*, 7 C. B. 456, which was followed in *Whaley v. Carlisle*, 17 Ir. L. R. 792, in holding that an entry of the expenditure of money by a receiver was not admissible, although the same roll admitted its receipt, Cresswell, J., said: "If the discharging part of the account be necessarily resorted to for the purpose of explaining the charging part, it may be evidence." Similar language was used by the other learned Judges, who took part in that judgment. No doubt collateral facts stated in a declaration against pecuniary interest may be referred to, but they must appear in the declaration itself.

In *Regina v. Birmingham*, 1 B & S. 768, Cockburn, C.J., laid it down that such a declaration may be received not only to prove so much contained in it as is adverse to the pecuniary interest of the declarant, but to prove collateral facts stated in it; at all events so far as relates to facts which are not foreign to the declaration, and may be taken to have formed a substantial part of it. Sir Fitzjames Stephen states the rule to be that the whole of any such declaration, and of any other statement referred to in it, is deemed to be relevant, although matters may be stated which were not against the pecuniary interest of the declarant; but statements not referred to in, or necessary to explain such declaration, are not deemed to be relevant, merely because they were made at the same time or recorded in the same place.

These authorities are ample to shew that the admissibility of the second entry does not make the first evidence. The first is neither referred to in the second, nor necessary for its explanation. The entry against interest is complete in

itself, and requires no further reference. The note as to the survey, therefore, cannot be made evidence simply as an appendage to it.

But it is urged that the two entries may be coupled together by extrinsic testimony. It is shewn that lot No. 2 was conveyed to Boulton on 23rd August, 1827, and lot No. 3 on 28th January, 1830. Hence, it is contended that it should have been left to the jury to say whether the note of the measurements made on 6th June, 1827, did not refer to a survey then made for Bolton, and charged for in the second entry. I do not think that any such question could have reasonably been submitted. The enquiry with which the jury were charged is as to the boundary between 3 and 4. Surely a memorandum as to that line made by a surveyor cannot be admitted, simply because on 6th June, 1827, he made a charge for surveying against Boulton, and on the 23rd August, 1827, lot No. 2 was conveyed to Boulton. It seems to me that it would be passing wholly into the region of conjecture to surmise that because Boulton acquired lot 3 in 1830, a charge for surveying against him in 1827 referred to that lot. But even if that were a not unreasonable supposition, I cannot perceive any legal ground upon which the two entries can be so connected.

It was, however, urged that the note of the survey should have been admitted in evidence, because it was officially made by Gibson in the course of the performance of a quasi-public duty in settling the bounds of lots, and that view has been adopted by the Court below. In that opinion I am unable to concur. It is true that before being admitted to full practice, a surveyor was obliged by law to take an oath to discharge his professional duty without favour, affection, or partiality, and, if required, faithfully to submit a plan of survey. Hence it is argued that all his professional acts are invested with a public character, and that his field notes should be admitted after his death, even if the survey were made at the instance of a private individual. I am by no means prepared to accept this doctrine even in the case of field notes, properly so called. As a matter of experi-

ence, we know that surveyors are not more free than other professional persons from a natural bias toward their employers. It seems to me it would be extremely dangerous in point of policy, and an unwise extension of the rule against hearsay, to admit after the death of a surveyor whatever entry he might have made in his field notes, when acting for a private party. The case is entirely different where he is employed in the public service, and is required to make a report of his field notes. But even there, I apprehend, the entries would only be admissible, not on account of their public character, but because they were made in the discharge of professional duty, and only to the extent to which duty required them to be made—a point upon which I shall have something more to say presently. But it should be observed that while declarations are admissible if they refer to the existence of any general or public rights, or any matter of public or general interest, and while declarations answering this description are not to be excluded in a controversy purely relating to private rights, yet declarations as to particular facts from which the existence of any such public right or matter of public interest may be inferred, are not admissible.

For example, in *Rex v. Bliss*, 7 A. & E. 550, where the question was whether a road was public or private, evidence that a deceased person had planted a tree on ground adjoining the road, of which he was a tenant, saying, at the same time, that he planted it to shew where the boundary of the road was when he was a boy, was held to have been wrongly admitted.

Even if Mr. Gibson had, in discharge of a public or professional duty, made regular entries of his work, these would have only been admissible to the extent to which it was his duty to make them. Before the entry was receivable, it would be necessary to shew that it was made in the discharge of a duty, and that such duty required the very thing to be done to which the entry related, and a record or entry of it to be made.

Subject to these conditions, I have no doubt that entries

made by a surveyor while employed in the public service are admissible, but the entry here in question is of a totally different character. I think it was rightly rejected, and that the decision of the Court of Queen's Bench should be reversed.

HAGARTY, C. J. C. P.—It is much to be regretted that so much litigation has been occasioned by the rejection at Nisi Prius of the entries in question, and the subsequent judgment that such rejection was wrong; as it seems more than probable that their admission would not have affected the result of the case.

Mr. David Gibson kept a diary in which he seems to have entered all sorts of matters, professional and private. On June 6th, 1827, he writes :

“Got Mr. Ashbridge to shew the stake between Nos. 3 and 4 in 1st concession; then measured to east side of No. 1, found 117 links narrow; lot 19.61; then run between 3 and four, and measured 19.61 at rear, &c.”

Then, in a “surveying account” of his, we find under date of June 15, 1827, an entry :

D. Bolton, Esq.....	£2 16s. 3d.
At D. Bolton's house for fence....	4s. 0d.

£3 0s. 3d. pd.

It was proved that Mr. D. Boulton on 23rd August, 1827, acquired title to lot 2, and to this lot 3 on 28th Jan., 1830.

There was no evidence whatever to shew that at or about the time of Gibson's entry, Boulton had any interest in either lot 3 or 4.

The entries are quite distinct, entered in different parts of his book, and do not refer each to the other in any way; and I do not see how we can assume, except by guess, that the payment referred to the survey between 3 and 4.

To hold them connected, so as to read them together as an entry against interest, the acknowledgment of payment rendering the whole admissible in evidence, would be, I think, carrying the doctrine of *Higham v. Ridgway*, 10 East 109, farther than any case has as yet warranted.

I think, as an entry or entries against interest, they should be rejected.

Then as to the other point.

In 1827 there was no law making it Gibson's duty to make any entry as to his work of surveying for individuals. There was no fixed course or custom of business among surveyors at that period shewn.

Many years after, the Legislature (12 Vict. ch. 35, sec. 45) directed every surveyor to keep exact and regular journals and field-notes of all his surveys, and file them in the order of time in which the surveys have been performed, and give copies thereof to the parties concerned, when required, at a fixed charge.

It is difficult to conceive the entry in question to be anything like that contemplated by the statute.

The object for which the entry was sought to be used was, as I understand, to prove an original post between 3 and 4.

Mr. Gibson writes down that he "got Mr. Ashbridge to shew the stake between 3 and 4."

The original survey, when I presume the posts were planted, was made 34 years before this time.

It is not easy to see how this entry, if admissible, shews anything beyond the fact that one of the Ashbridge family, not saying which member, shewed a stake between the lots to the surveyor.

I do not see that the entry tends more to prove the fact of that being the original post, than if it stated that Ashbridge said it was the stake, and one Smith said it was *not* the stake, and he measured by it as the stake.

In the entry referring to other lots, he says he found a pine tree which he considered to be an original monument. He says nothing about the stake between 3 and 4 being original or not.

It may be said that it is its admissibility, and not its value or importance that is now in question.

But to be admissible it ought to bear directly on the point in issue.

All it amounts to, at best, is a statement by a surveyor,

not that he found the original, or what he considered to be the original post, but that a person, of whose knowledge on the subject we know nothing, shewed him the stake between 3 and 4, and he appears to have measured by and from it.

I have seen no clearer exposition of the law as to such entries than *Smith v. Blakey*, L. R. 2 Q. B. 326, by Lord Blackburn: "The rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. * * * I think all the cases shew that it is an essential fact to render such an entry admissible that not only it should have been made in the due discharge of the business about which the person is employed, but the duty must be to do the very thing to which the entry relates, and then to make a report or record of it."

Tried by this test the present entry seems to me to be inadmissible.

Perhaps, under sec. 34 of the Administration of Justice Act of 1874, it might have been the better course to have refused the new trial, even if the Court thought the entries admissible, as, in the words of the Act, no substantial wrong or miscarriage had been occasioned by the rejection. The section applies both to the reception and rejection of evidence.

BURTON, J. A.—The plaintiff claims the premises in dispute as part of lot No. 3. The defendant defends on the ground that they are in fact part of lot number 4.

When the case came first before the Queen's Bench in 1875, that Court, although granting a new trial on other grounds, decided that the *so-called* field-notes of the late Mr. Gibson were rightly excluded, because it was not shewn that the survey referred to in them was made for the *owner at that time* of lots 3 and 4.

Upon that point the evidence offered at the last trial does not carry the case any further.

The evidence is offered to bind the owners of lot 3, but the person for whom the survey is alleged to have been made was not the owner of that lot at the time it was made, and there is nothing amounting to legal evidence to shew that it was made by his instructions. All that can be said is, that some years afterwards he became the owner, and the plaintiff claims through him. It was not now urged that the evidence was admissible on that ground. But it is claimed to be good evidence for the following reasons:—

1st. Because the entry was, as alleged, made in the usual course of business by Mr. Gibson, a Provincial Land Surveyor, whose duty it was to make it, who was personally cognizant of the fact stated therein, and who had no interest to misstate it; the entry being, it is said, made contemporaneously with the fact it professes to relate.

2nd. Because the note was officially made in the course of a *quasi* public duty.

3rd. That the entry was against the declarant's pecuniary interest.

4th. That it was admissible as evidence of reputation of matter of public and general interest.

On the first ground, it appears clear upon the cases that the declaration to be evidence must be confined strictly to the particular thing which it was the duty of the person to do, and that it must appear not only that it was his duty to do the act, but to make an entry of it.

Thus in *Price v. Torrington*, 2 Lord Raymond 873, it was the duty of the drayman not only to deliver the beer but to enter it in a book in the usual course.

In *Doe v. Turford*, 3 B. & Ad. 890, it was shewn to be the practice that the party serving the notice should make an entry of the date of service upon it.

But such declarations are only evidence so far as they relate to the matter which it was the declarant's duty to enter in the ordinary course of business.

Thus when the question was as to the age of a particular party, an entry by a clergyman in the registry of baptisms that he was baptized on a particular day, was held to be good

evidence, but that portion of the same entry which stated the day of his birth was rejected, because it was not the incumbent's duty to make it: *Rex v. Clapham*, 4 C. & P. 29.

It is, to my mind, a misnomer to call the document offered in evidence "Field notes." It was a simple entry in Mr. Gibson's diary, made for his own satisfaction or convenience, and it does not comply with any of the conditions under which the relaxation of the rule against the admission of hearsay evidence has been admitted. It is not shewn *aliunde* that the survey was made, and there was no obligation cast upon Mr. Gibson to make any entry or record upon the subject; and if there were, one would scarcely look for it in a memorandum book in which he entered the ordinary passing events of the day. But if otherwise unobjectionable, there is no evidence that the entry was made at or about the time of the transaction, and this is a prerequisite to the admission of such testimony.

This answers also the second ground on which it was urged that the evidence was admissible. If what was done was something which it was the declarant's duty to do, and to make an entry or record of it, it would be admissible in evidence on proof that the entry was made contemporaneously; and *a fortiori* if the act were done, and the entry made officially by a party in the performance of a *quasi* public duty.

It is, I think, too much to say that a person, though duly admitted to the profession of surveyor, is when making surveys for private parties filling any such position. If he were required by law to make official returns of such surveys, they would, on the principle already referred to, become admissible; but there is no such obligation, and no such returns were made, and no record kept even by himself. The entry in question is a private memorandum which there was no obligation upon him to make, and which is not receivable in evidence unless it can be brought within the rule of being an entry against the declarant's pecuniary interest.

It is not necessary, to make the evidence admissible on this ground, to give any proof of the time when the entry

was made: proof of the hand writing and the death of the party is all that is required.

The principle upon which such entries are receivable is that they are admissions by the parties making them, and are, therefore, presumed to be true, and have the effect of proving other statements contained in the same entry and connected with it; but it must be confined to statements contained or referred to in the same entry, and not to statements made at a different time not referred to, and not apparently having any connection with it.

In *Doe Kinglake v. Beviss*, 7 C.B. 456, Maule, J., at p. 496, during the argument says, "There are cases which shew that entries in which a man charges himself on the one side and discharges himself on the other are admissible altogether, when the whole is so incorporated as to shew it to be one entire subject matter, and where the thing would be otherwise unintelligible, as in the case of the accoucheur in *Higham v. Ridgway*, 10 East 109. But the question is, can you read an entry, which *per se* would not be admissible, where it is not essential to the understanding of what is legitimate evidence."

I apprehend that whatever doubts might once have been entertained on the subject, there can be no doubt now that such entry cannot be referred to.

In *Knight v. The Marquis of Waterford*, 4 Y. & C. Ex., 294, Baron Alderson is reported to have said, "In *Stead v. Heaton*, the matter stated referred to something else; it required that other thing to be read in order to explain the fact as stated. There is a material distinction between one case and the other. I think *Stead v. Heaton*, goes to the extreme verge of the law."

The fourth ground on which it was urged that the evidence was admissible, as evidence of reputation in a matter of public interest, is also untenable. I express no opinion as to whether this evidence would have been receivable upon the principle suggested upon an issue relating to matters of public and general interest; the mere circumstance that a private interest was also involved in the inquiry would be no ground for

excluding it, but the relaxation of the rule against the admission of hearsay evidence has never been extended to questions relating to matters of mere private interest, as to which direct proof is required.

I am of opinion, therefore, that the evidence was properly rejected by the learned Judge at the trial, and as this is the sole ground upon which the Court of Queen's Bench granted the order for a new trial, being, as they state, satisfied with the decision of the jury upon the other question, (as to which there is no reason to suppose that another jury would come to any other conclusion,) I am of opinion that the appeal should be allowed with costs, and the rule for a new trial discharged.

BLAKE, V. C.—I am unable to find any principle on which the judgment in the Court below can be supported. The rule which has been there invoked is one which, according to the authorities, is not to be extended. In *Brain v. Preece*, 11 M. & W., 775, Lord Abinger says, "With respect to the case of *Price v. Lord Torrington*, often as it has been cited, I am not aware of its universal application, and I have known Judges say they would not carry the doctrine of that case any further * * * It is better to adhere to that case as it stands, and not to give any extension to it." In *Doe v. Turford*, 3 B. & Ad. 897, Mr. Justice Park points out a distinction between entries made in the course of business and those made against interest. "It is to be observed," he says, "that in case of an entry falling under the first head as being an admission against interest, proof of the handwriting of the party and his death is enough to authorize its reception; at whatever time it was made it is admissible; but in the other case, it is essential to prove that it was made at the time it purports to bear date; it must be a contemporaneous entry." The rule laid down in *Doe v. Turford*, was certainly not extended in *Chambers v. Bernasconi*, 1 Tyr. 342, 4 Tyr. 531. The memorandum there tendered in evidence was;

“9th November, 1825.

“I arrested A. H. Chambers the elder only, in South Molton street, at the suit of William Brenton.

“THOMAS WRIGHT.”

In the Exchequer Chamber, Lord Denman, C. J., says, “We are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting facts necessary to the performances of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances. Admitting then, for the sake of argument, that the entry tendered was evidence of the fact, and even of the day when the arrest was made, (both which facts it might be necessary for the officer to make known to his principal), we are all clearly of opinion that it is not admissible to prove in what particular spot within the bailiwick the caption took place, that circumstance being merely collateral to the duty done.”

In *Smith v. Blakey*, L. R. 2 Q. B. 326, 333, in commenting on that case, Blackburn, J., says, “Then it is said, if not a statement against interest, the letter is admissible as a memorandum made in the course of business and in the discharge of a duty to Barker’s principals. But the rule as to the admission of such evidence is confined strictly to the entry of the particular thing which it is the duty of the person to do, and unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. * * * In the last case,” (referring to *Doe v. Turford*), “Parke, J., points out that an entry in the course of business to be admissible must be made at the very time of the transaction, whereas an entry against interest may be made at any time; and this explains the distinction: if the nature of the duty must be to do a particular act, and make a record of it at once, the time at which the entry is made is of great consequence, and goes to the essence of the admissibility, which is confined to the matters which it is the duty to record.” “As to an entry in the course of duty,” says

Mellor, J, " that must be made contemporaneously with the act done, and there must be a duty to do the particular act and at once to make a record of it. The present case does not fall, within the exception. * * * It was the duty of Barker to communicate all transactions to his principals, and keep them advised of all that he had done ; and the letter was written in the performance of that general duty ; but it is not a record of having done some particular duty within the cases which have established the exception ;" and Lush, J., corroborates this view in these words : " And when an entry is said to be admissible, as made in the course of duty, it is not meant that every entry or statement which it is the duty of the deceased to make can be used in evidence against third persons ; but the exception is limited to the case in which it was the duty of the deceased to do a particular thing and to record the fact of having done it."

I think it most unwise to extend the rule as to the admissibility of second-hand evidence, and I do not see how it is possible, without a very wide extension of such rule, to admit the evidence rejected on the trial of this cause, on the ground which in term it was thought proper to receive it. Here there was no duty cast on the surveyor to make this entry. There is no sufficient evidence to shew that it was made contemporaneously with the survey. It was an entry as to a collateral matter. It was not the entry of a fact, it was a mere matter of opinion, gathered we cannot say exactly from whom or in what manner.

I think the learned Judge, before whom the case was tried, was correct in his conclusion that there was no evidence that D'Arcy Boulton had any interest in the premises in question at the time of the survey. It seems to me, that on an entry in the book of a surveyor that he ran a line between lots 3 and 4, for Mr. Boulton, on the 6th of June, 1827, being produced, and, on its being shewn that Mr. Boulton got a conveyance of lot 3, on the 28th of January, 1830, the proper conclusion is there is no legal evidence of the fact that at the earlier date Mr. Boulton was interested in the property.

The principle of the case of *Higham v. Ridgway*¹⁰ East 109, cannot be here invoked. There is nothing to connect the entry of payment with the entry relied on in support of the defendant's case. There is no entry, as to this survey made by this surveyor, against pecuniary interest. The authorities are discussed in 2 Sm. L. C. p. 331 *et seq.*, 7th ed., and shew how unsafe it is to extend the rule as to the admissibility of entries in such cases. Baron Alderson says that *Stead v. Heaton* "goes to the extreme verge of the law." In *Doe v. Beviss*, 7 C. B. 457, Vaughan Williams, J., says, at p. 514: "It seems to me that the doctrine laid down by the Court of Exchequer in *Davies v. Humphries*, upon the authority of *Higham v. Ridgway* and *Doe v. Robson*, that "the entry of a payment against the interest of the party making it, is to have the effect of proving the truth of the other statements contained in the same entry and connected with it, has gone quite far enough. I, for one, do not feel inclined to carry it any further." If we admitted the note in this case we should be carrying it further than it has yet been carried. I think this appeal should be allowed, and that the verdict for the plaintiff should stand.

Appeal allowed.

RE WALKER.

Insolvent Act of 1875—Composition by member of Insolvent firm—Contestation of deed of composition and discharge—Notice of objection under sec. 54.

The only composition which the Insolvent Act of 1875 provides for in the case of an insolvent firm is one extending to all the partners, and including both the creditors of the firm and of the individual members.

Where a deed of composition made by one of two insolvents provided for his release on payment of a composition by him to the creditors, and directed a re-transfer to him of the estate, it was held invalid.

It is not necessary, under sec. 54, to give the insolvent notice of the facts upon which the objecting creditors intend to contest the confirmation of a deed of composition and discharge.

This was an appeal from the decision of the Judge of the County Court of the County of York.

On the 3rd of May, 1877, a writ of attachment in insolvency issued against William Thomas Walker and Wm. McBride, who had formerly been carrying on business in co-partnership as safe-manufacturers under the name of John Taylor & Co. This partnership had commenced in the early part of 1873, and continued until January, 1876, when a person named Poole was admitted as a partner, and the business was carried on by the new firm until 1st September, 1876. McBride and Poole then retired from the business, and a person named Morrison entered into partnership with Walker. This firm continued to carry on the business until the 10th February, 1877, when Morrison retired, and Walker alone continued to carry it on until the issue of the writ of attachment. The business was conducted during the whole period by the several firms, and by Walker alone, under the name of John Taylor & Co. The promissory note in respect of which the attachment issued, had been made by the firm while it consisted of Walker and McBride.

On the 18th of May, 1877, Walker made an affidavit in the ordinary form, to which was annexed a schedule containing a statement of all the liabilities of the firm of John Taylor & Co., of which he stated himself to be a partner. This schedule specified debts contracted during all the

phases through which the firm passed, including those incurred by Walker while carrying on the business alone. There was also a schedule containing an account of the assets which were enumerated as (1) Stock, &c., per inventory ; (2) Book accounts, good ; (3) Book accounts, doubtful ; (4) Personal property.

The insolvent Walker procured a deed of composition and discharge to be executed by the majority in number and three-fourths in value of the creditors named in the schedule whose claims amounted to \$100 and upwards, and who had proved their claims upon the estate. This deed purported to be made between Walker trading under the name of John Taylor & Co., thereafter called the insolvent, of the first part, and the several persons, firms and corporations, creditors of the insolvent, thereafter called the creditors, of the second part. It recited that the insolvent becoming involved and unable to meet his liabilities as they became due, had his estate placed in compulsory liquidation by a writ of attachment ; that the creditors had agreed to accept from the insolvent a composition of forty cents on the dollar, payable in three equal payments, and that he had agreed to pay this composition. It contained a covenant by him to pay the composition, and to give to each of the creditors promissory notes for these payments. In consideration of the premises and of the payment of the composition, the creditors, who executed for themselves, and so far as the law gave them power for all other creditors of the insolvent, released him from all debts and demands existing against him, *and provable against the estate*, and directed the assignees to convey to the insolvent all his estate that might have vested in them, upon the deed being executed by the requisite majority in number and value to obtain a confirmation. This deed was declared to be made in pursuance of the Insolvent Act of 1875.

A meeting of the creditors of the insolvents was called by advertisement for the 9th of October, 1877, to consider the terms of the deed and its confirmation,

at which a resolution of approval was passed, notwithstanding the objection of the present appellants. The learned Judge of the County Court, on a motion to rescind the resolution, after hearing the objecting creditors and the insolvent, decided that he had no jurisdiction to interfere with it. Upon the application for confirmation of the deed and for a discharge pursuant to it, the objecting creditors contested the validity of the deed, and desired to examine the insolvent, Walker, in order to show that he had committed acts which ought to disentitle him to a confirmation. The learned Judge refused to permit such examination, on the ground that sec. 114 required the facts upon which the objecting creditors relied to be set forth in detail with particulars of time, place, and circumstance; and he made an order confirming the deed and granting a discharge to Walker pursuant to the terms thereof.

The petitioners appealed.

The objecting creditors who brought the appeal were two firms, who were the only creditors of the insolvents jointly who had proved claims, and a firm to whom the insolvent, Walker, became indebted while carrying on the business alone.

The case was argued on the 15th of December, 1877, (a).

Rose, for the respondent. The appeal book contains the evidence by which it is intended to prove fraud; but the learned Judge of the County Court declined to hear any evidence on that point, on the ground that no notice of the facts upon which it was intended to found the charge of fraud had been given as required by section 114, and that under section 54, in the absence of such notice, the evidence could not be received. If the decision of the learned Judge was right, this Court cannot consider that evidence on this appeal.

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

Kerr, Q. C., (with him W. Redford Mulock) for the appellant. Sec. 114 does not apply to this case at all. There are two kinds of discharges referred to in the Act, a deed of composition and discharge granted by the creditors, such as that provided for in section 49; and secondly where the insolvent is unable to get the consent of his creditors, and applies to the Court for a discharge at the expiration of one year from the date of the assignment, under section 64. There are provisions made for contesting the confirmation of this discharge, which is spoken of as a discharge as opposed to a deed of composition and discharge; and it is to this latter class of discharges that section 114 applies. There is not a word in the statute requiring us to give notice of particulars of fraud in the case of a deed of composition and discharge. The 53rd section says that upon such application for a discharge, any creditor may appear and oppose such confirmation. He is neither obliged to give any notice, nor is he limited to objections taken. Moreover the objection is improperly raised. *Re Sharpe*, 20 C. P. 82; and *Re Parr*, 17 C. P. 521, shew that it should have been a substantive application.

Moss, C. J. A.—Thought that sections 54 and 114 were not to be read together, and that the Court could consider any objection founded on the insolvent's evidence.

Rose then asked for the case to be adjourned, as he was not prepared to argue the question of fraud, and he desired to examine the insolvent.

The Court granted the adjournment of the argument on that point, and consented to hear the question of the invalidity of the deed on other points discussed.

Kerr, Q. C., (with him W. Redford Mulock,) for the appellants. This deed cannot be sustained apart altogether from the question of fraud, as it contains no provision for the payment of the partnership liabilities. The joint creditors are clearly entitled to be paid in full out of the partnership assets, but by the terms of the deed the assignee is

to reconvey them to Walker—which will leave the appellants without any remedy, as the evidence shews that the assets which passed to the assignee by virtue of the assignment belonged to the firm of Walker & McBride. There was no schedule of Walker's separate assets and liabilities filed as required by the Act. The only one filed contained the partnership liabilities and assets. Moreover it is submitted that there can be no such thing as a deed of composition by separate creditors until the partnership creditors are paid in full. They referred to *Re Cockayne*, L. R. 16 Eq. 218; *Ex parte Morley*, L. R. 8 Chy. 1026; *Ex parte Dear*, L. R. 1 Chy. Div. 514; *Ex parte Hammond*, L. R. 16 Eq. 614; *Lewis v. Tudhope*, 27 C. P. 505; *Ex parte Glen*, L. R. 2 Chy. 670; *Re McLaren v. Chalmers*, 1 App. R. 68; *Tomlin v. Dutton*, L. R. 3 Q. B. 466; *Allan v. Garratt*, 30 U. C. R. 165; *Re Garratt*, 28 U. C. R. 266; *Preston v. Hunter*, 37 U. C. R. 177.

J. E. Rose, for the respondent, contended that "creditors" referred to all Walker's creditors, and that the deed, therefore, was not open to the objection that it did not provide for the partnership creditors. The assets, although placed in the schedule as the property of the insolvents, were vested in Walker by the successive arrangements, made upon the changes in the composition of the firm. It is well settled that the separate creditors have power to bind the minority of joint creditors by a deed of composition which provides equally for both classes of creditors, and upon such a deed being executed express provision is made in the 60th section of the Insolvent Act, 1875, for the reconveyance of the estate to the insolvent. The objection to there being no schedule of Walker's individual debts and liabilities cannot be taken now, as it is too late to file another.

Kerr, Q. C., in reply. The schedule was merely referred to for the purpose of shewing that only the firm assets were handed over to the assignee.

January 3, 1878. Moss, C.J.A. (a)—During the argument, we intimated an opinion that the ruling of the learned Judge was erroneous, and subsequent consideration has confirmed our view. The section does not mention applications for a confirmation, and its provisions could therefore be only extended to this case by construction. Whether such an extension should be made or not, we do not think it was a sound exercise of discretion to prevent the objecting creditors from examining the insolvent, or even arguing upon the effect of the depositions which he had already made in the proceedings. It imposed no hardship upon the insolvent to refer to these statements made by himself—especially when he was present, and could have offered any explanations that his counsel deemed necessary. Indeed, the proposal of the objecting creditors to examine him afresh, afforded him the amplest opportunity of protecting himself against misconception. If justice demanded that he should be furnished with a statement in detail, an enlargement should have been granted for that purpose; but it is difficult to suppose that any such information could be deemed necessary, where the objections were to be founded upon the examination of the insolvent himself. The result is, that if in our opinion the composition deed were otherwise valid, we should have been obliged to remit the case to the Court below in order that the objections founded upon the insolvent's own examination might be considered.

But we are of opinion that the deed cannot be sustained. It is a deed made by and providing for the payment of a composition by, and the release of, one of the insolvents. The creditors by force of whose assent it is sought to make it binding upon the appellants, are persons to whom the two insolvents, the insolvents and Poole, the insolvent Walker and Morrison, and the insolvent alone were indebted. It contains a release to the insolvent Walker

(a) *Present*.—Moss, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

alone from all these claims. And it directs the assignee to convey to him alone the estate, the greater portion of which, according to the contention of two of the objecting creditors, belonged to the two insolvents. The claims of these two, who are the only creditors of the firm of John Taylor & Co., while it was composed of the two insolvents, are less than \$3,000. The assets are valued by the insolvent Walker at over \$10,000. Obviously if their contention as to the ownership of these assets is correct they will be paid in full. If they are bound by the composition, they are compelled to accept 40 cents on the \$, and that by the vote of the separate creditors of Walker, who would thus be in effect appropriating to themselves a portion of the estate to which these objecting creditors were entitled, in order to obtain payment in full. It is not necessary—it would not even be proper—to express any opinion upon the validity of this claim of the objecting creditors. It is quite sufficient if it be made *bonâ fide*, and of this there is little room for doubt when it is considered that if it fails these creditors will receive literally nothing. If this stock was the property of Walker alone at the date of the attachment, there is an absolute dearth of assets to meet the claims of the joint creditors, for there appears to be neither joint estate nor separate estate of McBride.

But even if the estate directed to be transferred to Walker were clearly and indisputably his own separate estate, there is no authority in our Insolvency Act for the separate creditors ceding this to him against the will of the joint creditors, because they are the majority in numbers, and represent claims of more than three-fourths in value. Our Act has not followed the English Act of 1869, in making provision for the joint and separate creditors dealing independently with the estates on which they respectively have a primary lien. By the rule made in pursuance of the English Act it is provided that in cases of proceedings for liquidation by arrangement or composition, separate meetings of the different classes of creditors shall be held. The joint creditors may come to such resolution

as they may think fit with regard to the joint estate. The separate creditors may also come to such resolution as they may think fit with regard to the liquidation of the estate of their individual debtor. In the event of the separate creditors of any such debtor agreeing to accept a composition, in cases where the joint creditors have resolved upon a liquidation by arrangement, the assets of the separate debtor are to be made available by the trustee for the payment of the composition in such manner as the Court shall direct and approve, and any surplus of the separate estate remaining in the hands of the trustee after payment of the composition, shall be deemed partnership assets.

These provisions seem to be reasonable, and in harmony with the rule which makes joint estate the primary fund of joint creditors, and separate estate the primary fund of separate creditors.

But when providing for a composition our Legislature does not seem to have had the case of partners distinctly in view. The provision in the 52nd section is, that if the insolvent has obtained the assent to the proper composition and discharge of the requisite proportion of his creditors, the assignee shall give his certificate, which, among other things, is to declare the rates of dividend actually declared, and likely to be realized out of the estate for the unsecured creditors. The 55th section requires the insolvent to produce, upon the application for confirmation, a certificate from the assignee that he has delivered a sworn statement of his liabilities and assets as required by the Act. The 60th section declares that so soon as the deed of composition and discharge shall have been executed as aforesaid, it shall be the duty of the assignee to "reconvey the estate to the insolvent," and the deed of re-conveyance need not contain any further or more special description of the effects and property re-conveyed than is required to be inserted in the deed of assignment. By the 61st section it is enacted that the confirmation of the discharge of a debtor shall absolutely free and discharge him from all liabilities (with certain exceptions) existing against him,

and provable against his estate, which are set forth in his statement of his affairs, or in any supplementary list furnished by him in sufficient time previous to his discharge.

By the interpretation clause, "debtor" is defined to mean "any person or persons, *co-partnership*, company, or corporation having liabilities, and being subject to the provisions of this Act;" and "insolvent" is defined to mean "a *debtor* subject to the provisions of this Act unable to meet his engagements, or who shall have made an assignment of his estate for the benefit of his creditors." It is also enacted that in the case of any partnership the word "he" in relation to any insolvent, shall mean "the partnership." These sections, to which others might be added, seem to shew that in the case of a partnership the only composition for which provision is made in the Act is one extending to both partners, and including all the creditors of the firm, and of the individual members. Before the Act of 1869, a similar difficulty was experienced in England, where it was doubted whether any valid deed could be made where there were joint and separate creditors—at least, if the deed operated as a release of debts.

The English authorities and the decisions under our own Insolvent Act, seem to point to the conclusion that this deed cannot be sustained.

In *Re Garratt*, 28 U. C. R. 266, it was held that a deed of composition and discharge by insolvent partners must, in order to be operative, provide for separate as well as joint creditors. In *Allan v. Garratt*, 30 U. C. R. 172, *Richards*, C. J., in referring to the same deed, says that it seems to refer to the debts of the insolvents, and not in any way to their individual debts and creditors, if they have any; and that the authorities shew that such a deed does not bind non-assenting creditors, whether they are the creditors of the partnership or of the individual partners only. In *Preston v. Houston*, 37 U. C. R. 177, it was held that a deed of composition and discharge made by the creditors of the insolvents was valid, because there were no separate creditors.

So in *Pidgeon v. Martin*, 25 C. P. 233, Wilson, J., held that a deed did not defeat the plaintiff's claim, because it was made only with the creditors of the partnership of the defendant with one Scott, while the plaintiff's claim was against the defendant alone.

In *Ex parte Glen*, L. R. 2 Ch. App. 670, the question arose upon a composition deed executed under the Bankruptcy Act, 1861, for the benefit of separate creditors only. It was held not to be binding even upon a dissenting separate creditor, because sec. 192 of the Act, which the provisions relating to composition in our Act of 1869 closely followed, did not extend to such a deed. Lord Cairns said at p. 672:—"The debtor was a partner; he had joint creditors and separate creditors. Now section 192 *primâ facie*, makes no difference between these classes; it speaks generally of a deed entered into between the creditors or any of them." He then explains the meaning of the words, "or any of them," and holds that according to the natural construction of the section, the deed must be one of which the benefit will enure to all the creditors generally.

In *European Central Railway Co. v. Westall*, L. R. 1 Q. B. 167, an action was brought against the defendant upon an individual liability. It was held that a composition deed made between him and his two partners of the one part, and trustees on behalf of their creditors of the other part, by which all the estate of the defendant and his two partners was assigned for the benefit of their creditors, afforded no defence to the action.

The language of Cockburn, C. J., was, that the deed was a composition deed between the members of a firm and the creditors of the firm, and that in such a case it was impossible to mix up the private debts of an individual member of the firm with the general partnership liabilities. This, it may be observed, was a deed under the Act of 1861.

In *Tomlin v. Dutton*, L. R. 3 Q. B. 466, decided under the same Act, it was held, following *Ex parte Glen*, that creditors meant "all creditors," whether joint or separate, and that a composition deed made between the firm and

the joint creditors, without reference to the separate creditors, was invalid against non-assenting joint creditors.

In *Rixon v. Emary*, L. R. 3 C. P. 546, the majority of the Court of Common Pleas held that a deed of composition made by two persons for the payment of 8s. in the £ upon their debts to the joint creditors of the two, and to the separate creditors of one of them in discharge of such debts, was good, because the other had no separate creditors; but, as they expressly approved of the decision in *Re Glen*, that where there are distinct classes of joint and several creditors, the deed must include and bind both sets of creditors. Bovill, C. J., in dissenting from the judgment of the Court upon other grounds, expressed the opinion that the law was settled, that a deed of arrangement by several debtors with their creditors must, in order to be binding upon non-assenting creditors, under the 192nd section of the Bankruptcy Act, 1861, purport to be made or entered into with, and to bind *all* their creditors, and must embrace several as well as joint creditors where any of each class exist.

In *Ex parte Oldfield*, 11 L. T. N. S., 756, Lord Westbury held that the Bankruptcy Act, 1861, did not admit in the matter of a deed of assignment, which as to this question stands upon the same footing as a deed of composition, that separate creditors should be consulted separately in respect of the separate estate. By the provisions of the Statute, he held that the whole body of the creditors are to deliberate and decide together.

These authorities, to which many others might be added, seem to establish the principle that while a general deed of composition providing for all creditors, and dealing with all the estates, joint and separate, may be valid, a deed such as that in question is not sanctioned by the Statute.

Anomalous and unjust consequences may follow from the present state of the law, but that is a matter for the consideration of the Legislature.

The appeal must be allowed, and the order of confirmation rescinded, and the appellants' costs must be paid out of the estate.

BURTON, J. A. The authorities clearly establish that a deed of composition by debtors under the Insolvent Act must, in order to be binding upon non-assenting creditors, purport to be made or entered into with and to bind all their creditors, and must embrace joint as well as several creditors where each class exists. It is also decided that the composition must be equal, and that the whole body of creditors is to deliberate and decide together; and there would seem to be nothing in the Act to militate against the conclusion that the majority of the separate creditors may bind the minority constituting the joint creditors, even if there be no separate estate, or *vice versâ*.

The deed in this case, which appears to have been prepared with a good deal of care, is not open to the objection of failing to deal with and to provide for each class of creditors equally.

It purports to be a deed of composition by one of the two insolvents, and provides for a composition to all the creditors, which would include the creditors holding claims against him jointly with McBride; but the deed then proceeds to direct a re-transfer to him of his estate, and is, in my opinion, invalid on that ground.

When a firm are jointly placed in insolvency, all the joint property of the insolvents, as well as all the separate property of each, to which they, or either of them, may become entitled up to the time of their obtaining their discharge, vests in the assignee for the payment of all the debts, both of the firm and of the individual members of it. It is true the separate estate is to be applied first in discharge of the separate debts, and the joint estate in discharge primarily of the joint debts; but ultimately each constitutes a fund for the payment of all the liabilities to the extent of the insolvents' interest in the fund, and the right of the creditors to follow it.

Although sec. 60 provides that as soon as a deed of composition and discharge shall have been executed, it shall be the duty of the assignee to re-convey the estate to the insolvent, it would appear to be confined to the case of a

single insolvent, or at all events, to cases where there is only one class of creditors. No express provision is made for so dealing with the estate where one of several insolvents has effected a composition with his creditors, and there may perhaps be good reason for this. The separate creditors may find it to their advantage to accept a composition upon their claims; they may have power under the Act to force it upon the other creditors. But there is nothing apparently that enables them to take from the joint creditors a portion of the fund to which they are entitled to resort in the event of the joint estate proving insufficient.

When a sole insolvent effects a composition, the insolvency proceedings are at an end, and he becomes entitled to the estate. But where one of several insolvents effects an arrangement with his creditors otherwise than by a distribution of his estate in insolvency, there would appear to be no good reason for withdrawing from the control of the joint creditors a portion of the assets to which, in certain contingencies, they have a right to resort.

For these reasons I consider the deed invalid. I am of opinion that this appeal should be allowed.

PATTERSON and MORRISON, JJ. A., concurred.

Appeal allowed.

ALLAN V. MCTAVISH:

Mortgage—Action on covenant—38 Vic. ch. 16, sec. 11, O.—C. S. U. C. ch. 78.

Held, reversing the judgment of MORRISON, J., 41 U. C. R. 567, that sec. 11 of 38 Vic., ch. 16, O., merely limits suits which directly affect the land or its proceeds to ten years; but an action on a covenant in a mortgage for the payment of the mortgage money may still be brought within twenty years, under C. S. U. C. ch. 78.

DEMURRER.—Declaration: that the defendant by deed bearing date on or about the 24th November, 1856, covenanted to pay one John Arnold, or his assigns, the sum of £50 5s, and interest in four equal annual instalments, the first instalment whereof became due and was payable on or before the 24th of November, 1857; and the said John Arnold duly assigned the said mortgage to the plaintiff, yet the defendant did not pay the said principal money or interest or any part thereof.

Second plea: that the plaintiff's claim in the declaration mentioned is a sum of money secured by way of mortgage upon certain lands in Ontario, and this suit is brought to recover the same, and the alleged cause of action did not accrue within ten years before this suit.

It was from the decision of Morrison, J., 41 U. C. R. 567, overruling a demurrer to this plea that this appeal was brought.

The appeal was argued on the 4th of January, 1878 (a).

Bethune. Q.C., (with him *A. Galt*), for the appellant. The words of the Act, 38 Vic., ch. 16, O., must be read with reference to the general intention of the statute, which was to shorten the time for bringing an action whereby the title to land should be brought into question. The Act is merely an amendment to Consol. Stat. U. C. ch. 88, and was only intended to limit the recovery of money charged upon land by any suit against the

(a) *Present*.—MOSS, C.J.A., PATTERSON, BURTON, JJ.A., and BLAKE, V.C.

land; but it does not profess to deal with or affect in any way the remedy against the person conferred by Consol. Stat. U. C. 78. The covenant upon which this action is brought is not a necessary part of the mortgage: it is a distinct security. Section 11 is similar to section 19 of Consol. Stat. U. C. ch. 88, under which it has always been held that the mortgagee was entitled to sue on the covenant for the excess above the six years arrears of interest, and the Legislature must have intended the Act in question to receive the same construction. They referred to *Sinclair v. Jackson*, 17 Beav. 405; *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Paget v. Foley*, 2 Bing. N. C. 679; *Strachan v. Thomas*, 12 A. & E. 558; *Hunter v. Nockolds*, 1 Mac. & G. 640; *Elvy v. Norwood*, 5 DeG. & S. 243; *Airey v. Mitchell*, 21 Gr. 510; *Howeren v. Bradburn*, 22 Gr. 98; *Fisher on Mortgages*, 3rd ed., 586.

Ferguson, Q.C., for the respondent. The language in the preamble of the Act in question is conformable to that used in the 11th section, which enacts in positive terms that no action or suit either at law or in equity shall be brought to recover any sum of money secured by any mortgage upon any land but within ten years after a present right to receive the same shall have accrued; and being read together they unmistakably show that the intention of the Legislature in passing that section of the statute was to provide that money so secured upon land in Ontario should be deemed to be satisfied to all intents and purposes at the end of such period of ten years, unless an acknowledgment was given or part of the money or interest was paid within that time. Section 7 of Consol. Stat. U. C. ch. 78, must therefore be held to have been repealed by implication in such a case as this when the covenant secures money charged upon land. The only question then is, is the money, which they seek to recover in this action charged upon land? (BLAKE, V. C.—This money is not a charge on land.) The plea asserts that it is, and this appeal is on a demurrer to that plea. *Ford v. Allen*, 15 Gr. 565, and *Edmunds v. Waugh*, L. R. 1 Eq. 418 are not in point

as they are not cases in which the mortgagee was plaintiff. The covenant is not an independent security to pay money, but a covenant to pay the amount charged on the land, and as the plaintiff's right to recover against the land is barred, the covenant is no longer in force. *Howeren v. Bradburn*, 22 Gr. 98, and the other cases cited in which it has been held that the personal action to recover for more than six years arrears exists under Consol. Stat. U. C. ch. 78, should not be followed, in such a case as the present, as they are plainly repugnant to the statutes under which they were decided.

January 3rd, 1878 (a). Moss, C. J. A.—The question for determination is, whether “The Real Property Limitation Amendment Act, 1874,” has limited to ten years the period within which an action may be brought to recover the money secured by a mortgage of real estate, which contains a covenant for payment by the mortgagor. The point is expressly raised by the pleadings.

The decision seems to affirm that the limitation for bringing an action of covenant upon a bond or other specialty is still twenty years, but it proceeds upon the ground that the defendant is entitled to succeed, because the Statute of 1874 has expressly limited actions to recover money secured by any mortgage of land to ten years, and that this appears from the pleadings to be such an action.

The plaintiff contends that the object of the statute was simply to shorten the time for the recovery of money charged upon land by any action or suit which directly affected the land or its proceeds, and relies upon the analogy furnished by the cases, which have permitted more than six years' arrears of interest to be recovered upon the covenant, although they formed no charge upon the land itself for a longer period.

The defendant relies upon what he asserts to be the plain and unambiguous language of the Legislature, which

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he has embodied in his plea; and contends that the class of cases referred to either have no application, or involved a departure from the terms and spirit of the statutes under which they were decided, that should not be followed.

Before the enactment under consideration the right of the mortgagee to recover his principal money was limited by Consol. Stat. U. C. ch. 88, sec. 24, which prescribed a period of twenty years. The amount of interest recoverable was governed by Consol. Stat. U. C. ch. 88, sec. 19, and ch. 78, sec. 7.

The former section, which is taken without material alteration from the Imperial Statute 3 & 4 Wm. IV., ch. 27, sec. 42, enacts that no arrears of interest in respect of any sum of money charged upon or payable out of any land shall be recovered by any action or suit, but within six years after becoming due or after a written acknowledgment.

The latter section, which is derived from the Imperial Statute 3 & 4 Wm. IV., ch. 42, sec. 3, requires actions of covenant or debt upon a bond or other specialty to be commenced within twenty years after the cause of action has arisen. These sections have formed the ground work of the long series of decisions, the applicability of which has been challenged by the learned counsel for the defendant, who addressed to us a very careful and well considered argument.

It is true, as pointed out by the learned counsel, that at first some difficulty seems to have been felt in harmonizing the two Imperial Statutes, which were passed during the same session, but this difficulty was of short duration; and although it may be that some questions arising upon them are still open, it is quite clear that a complete reconciliation of the two sections has been effected by considering one applicable where the remedy is sought against the land, and the other where it is sought against the person.

The complication which arose from or was increased by the circumstance that while both the Imperial Statutes were passed during the same session, one received the royal

assent before the other, suggesting as it did questions whether one partially repealed the other, and whether they related to different subject matters or different remedies, has been removed.

The solution of the difficulty has been to treat the charge on the land and the specialty debt on the covenant as completely distinct, and as if made in separate deeds.

The grounds upon which these decisions proceeded were precisely applicable to the sections in the Consolidated Statutes, for it so happens that here, as in England, the provision allowing twenty years on a specialty came into force after the other. These decisions are so numerous and of such high authority that their binding force is not open to question. Nor can I agree that there is any plausible ground for the contention that they are repugnant to the true intent of the statutes, and ought not to be accepted as guides in the interpretation of the new statute. On the contrary they are in my humble judgment, as one would expect to find, entirely consistent with all sound rules of interpretation.

In the first case that appears to have arisen upon these sections—*Paget v. Foley*, 2 Bing. N. C. 679—Tindal, C. J., thought that there was no conflict between the two enactments, but that if there was, the affirmative enactment permitting the action of covenant to be brought within the longer period must prevail.

The other Judges who took part in the decision seem to have laid stress upon the relative dates at which the Acts received the royal assent, although, as was pointed out, it seemed difficult to suppose from the short interval between the passing of the two Acts that any contradiction could have been intended by the Legislature. They all agreed that the action of covenant, which in that case was for arrears of rent due under an indenture of demise, was not limited to six years.

The Court of Queen's Bench in *Strachan v. Thomas*, 12 A. & E. 558, expressed its concurrence with that decision.

The construction of the two enactments was raised before

Sir Edward Sugden, when Lord Chancellor of Ireland. He states in *Hughes v. Kelly*, 3 Dr. & War. 490, that a great deal of the difficulty which has arisen upon the construction of these statutes in England sprung from the circumstance, that the latter Act was not framed by the persons who framed the former Act. He held that the statutes being *in pari materia* should be construed together, and if possible reconciled; but the covenant in the case not being with the parties to be paid, he decided that in the proceeding before him only six years' arrears of interest could be allowed.

The subject was fully considered by Lord Cottenham in *Hunter v. Nockolds*, 1 Mac. & G. 640, and although that case is very familiar the *ratio decidendi* has such a direct bearing upon this appeal that I may be pardoned for tracing its outlines. He points out that the earlier provisions of ch. 27 relate to the limitation of actions and suits relating to real property, and that sec. 40 (with which sec. 24 of Consol. Stat. U. C. ch. 88, exactly corresponds) having made twenty years after the accrual of the right the period within which the proceedings must be instituted to recover any sum of money charged upon or payable out of land, the 42nd section provides that no more than six years' rent or interest in respect of any sum of money charged upon or payable out of any land or rent shall be recovered by any action or suit. He then suggests that the object of the Act being to relieve land from arrears of charges beyond six years, but the enactment creating a bar to all actions and suits for money charged upon or payable out of land, the question probably arose, whether, in protecting the land, the Act had not relieved the debtor from his personal liability, which formed no part of its objects; and that if so this must soon have been discovered, for by ch. 42, sec. 3, (passed only three weeks after the former Act) it is provided that all actions of covenant or debt upon any specialty shall be brought within twenty years.

Perhaps the speculation as to the origin of the later Act is hardly consistent or of equal probability with Sir

Edward Sugden's explanation, but it is not on that account the less valuable as a judicial exposition of the objects of the two enactments, and it strongly supports the view which the present appellant proposes of the intent of our Act of 1874. He then proceeds to remark that the provision of the later statute does not profess to deal with the land upon which any demand might be secured, but with the personal action only, and the former Act professed to deal with the land only; and that so considered there could be no inconsistency between these provisions, the subject matter of each being different, and no question could have arisen but from the generality of the words "action or suit" in the 42nd section of the earlier Act; but whether the later provision was framed without reference to the earlier, intending to provide for a different subject matter, namely, personal liability and not the land charged, or whether it was intended to limit the generality of the former provisions by confining them to what was the subject of that Act, namely the land, was immaterial, for the provisions of the two must, if possible, be reconciled, which can only be done by considering the first Act as applicable only to the land, and the latter as applicable only to the person.

He sums up with the formula that no more than six years' arrears of interest in respect of any sum charged upon or payable out of any land shall be recovered by any action or suit other than and except in actions upon covenant or debt upon specialty, in which cases the limitations shall be twenty years.

I think it will appear when the provisions of our Act of 1874 are examined that this case covers the whole ground, and disposes of every argument advanced by the respondent. But the principles thus enunciated do not rest upon the sole authority, eminent as it confessedly is, of Lord Cottenham. In *Manning v. Phelps*, 10 Ex. 59, the Court of Exchequer held that the limitation of six years did not extend to an action on a covenant for payment of a rent charged upon land by the same deed, although the

right to recover the rent charge out of the land had been barred by the statute. No weight was attached to an argument precisely similar to that addressed to us yesterday, namely, that the covenant was not an independent contract to pay money, but a covenant to pay that particular annuity charged on the land, and that as the annuity had ceased to exist, the covenant was inoperative.

In *Sinclair v. Jackson*, 17 Beav. 405, the Master of the Rolls expressed the opinion that, although interest upon a mortgage of a reversionary estate can only be recovered for six years as against the land, it is otherwise upon the covenant for payment. In that case there were 16 years' arrears of interest upon money secured by a mortgage upon land with a covenant to pay, when the mortgagee brought a suit of foreclosure against the mortgagor's heir. In his bill he raised no question of liability on the covenant or of his right to tack as against the heir. Upon an appeal from the report of the master, who had held the plaintiff entitled to six years' arrears only, the finding was sustained, on the ground that the Court could not decide the question, as it had not been raised upon the pleadings, and that the form of the decree, which simply directed the Master to take an account of what was due on the mortgage securities, precluded the assertion of the right.

But the learned Judge remarked at page 413: "I do not think it makes any difference whether the debt, which the plaintiff claims, is secured by a covenant in the same or some other deed; in either case it is a distinct security." This opinion, which is amply supported by other cases, effectually disposes of any notion that the present appellant is in any worse position than if he had a separate money bond for the amount of the mortgage debt.

The soundness of this interpretation is also expressly or tacitly recognized in the decisions which hold that where there is a trust created for the payment of the mortgage, the full arrears may be recovered.

For example, although the case of *Cox v. Dolman*, 2 DeG. M. & G. 592, was heard by special leave before the Lord

Chancellor and the Lord Justices in the first instance, because he felt himself embarrassed by what he conceived to be a conflict between the decision of Lord Lyndhurst in *Young v. Waterpark*, 15 L. J. N. S. Ch. 63, and that in *Hunter v. Nockolds*, 1 Mac. & G. 640, it is plain that the principles laid down in the latter case, with which we are here concerned, are unaffected by the judgment.

In *Lewis v. Duncombe*, 29 Beav 188, the Master of the Rolls explained the decision in *Cox v. Dolman*. He said that the Lord Chancellor and Lords Justices were of opinion that the case before Lord Lyndhurst, and *Hunter v. Nockolds*, ought not to be regarded as contradictory.

In *Round v. Bell*, 30 Beav. 121, the learned Judge adhered to the views he had expressed in the case last mentioned.

In *Shaw v. Johnson*, 1 Dr. & Sm. 412, the same view of the enactments is implied.

Further illustrations of the ample acceptance which Lord Cottenham's construction has received, are furnished by the cases in which a mortgagee has been allowed, as against the heir of the mortgagor, to tack additional arrears of interest in order to avoid circuitry of action. It is sufficient to refer to *Elvy v. Norwood*, 5 DeG. & S. 243, where the Vice-Chancellor said: "Upon the construction of the statute 3 & 4 William IV. ch. 27, it had been decided, and, I think, rightly decided—at all events in a way that is binding on this Court—that the only arrears of interest that are a charge upon the land are arrears for six years. On the other hand, there is the other statute, the 3 & 4 William IV. ch. 42, which leaves the personal liability on the covenant open for twenty years."

The cases in our own Court of Chancery have adopted the same rule. In *Carroll v. Robertson*, 15 Gr. 173, Mowat, V. C., concisely put it that "During the life of a mortgagor the mortgagee can only claim a lien on the land for six years of overdue interest, but the mortgagor is liable on his covenant for twenty year's arrears; and after his death, the mortgagee, to avoid circuitry, is permitted as against

the heirs, to tack to his debt the whole amount of interest recoverable on the covenant."

In *Airey v. Mitchell*, 21 Gr. 512, Blake, V. C., stated the result of the authorities to be that "No more than six years' arrears of interest in respect of a sum of money charged upon, or payable out of land, can be recovered by suit, except in an action upon the covenant, in which case the limitation shall be 20 years."

The same doctrine was enunciated in *Howeren v. Bradburn*, 22 Gr. 98.

It was after this long and consistent array of authorities, of which they must be assumed to have been cognizant, that the Legislature proceeded to pass the Act in question. It opens with a recital, which, to my mind, clearly indicates an intention to amend ch. 88, but to leave ch. 78 unaffected. It declares, *inter alia*, the expediency of lessening the time for making entries and distresses, and for bringing actions and suits to recover land or rent, and for redemption by mortgagors, and for recovery of dower, and of money charged on lands or on rent; but it does not contain the remotest suggestion of interference with the time for resorting to the personal remedy. The object to be gathered from the recital is that of relieving the land from charges, and not that of releasing the debtor from personal liability. It is only necessary to advert to the reasoning in *Hunter v. Nockolds*, 1 Mac. & G. 640, to appreciate the force of this distinction. The enacting part proceeds to lay down provisions for a number of cases, which were previously regulated by ch. 88; and in the 11th section declares that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within *ten* years next after a present right to receive the same shall have accrued to some person capable of giving a discharge," &c. This is the clause upon which the judgment in appeal proceeded.

Its language is precisely identical with that employed

in ch. 88, Consol. Stat. U. C., except that the period is reduced to ten years. We have seen that the provisions of ch. 88 did not prevent a mortgagee from recovering under ch. 78, but that his rights against the land, regulated by one enactment, and his rights against the person regulated by the other, are entirely separate and distinct. It manifestly follows that the alteration of ch. 88, by simply substituting a shorter period for a longer leaves the other statute untouched.

The argument which was most strenuously urged was, that money sought to be recovered was in fact charged upon land, and that the right to recover it being confessedly lost, there could not consistently with the statute be any remedy. That general view seems to have strongly impressed Sir Edward Sugden, before he was brought face to face with the construction of the two statutes, for in *Henry v. Smith*, 2 Dr. & War. 381, he said:—

“It was said that if judgment creditors are held to be included in this section, they still will be able to proceed against the personal estate of their debtor for the full arrears of interest. I admit no such consequence. The two clauses relate to money secured upon land, and to the interest of money so secured; and when the Act of Parliament says no action shall be maintained after a given number of years for the recovery of such sum or such interest, how can a man after that period bring any action in respect of his debt? If the action is brought so as to charge the personal estate, the answer is obvious; ‘you have brought your action in respect of a sum of money charged upon or payable out of real estate, you are therefore within the terms of the Act, and consequently your right is barred.’ The personal estate may be an additional security to such a creditor, but however numerous his securities, they could not carry his right farther; if his remedy under the real security is gone, it is also barred of all the other securities.”

But he was then considering only ch. 27, sec. 42, taken in connection with an enactment that every judgment debt should bear interest, and the statute which extended ch. 42, sec. 3, to Ireland was not in question.

We have already seen from the notice of *Hughes v. Kelly*, 3 Dr. & War. 490, how the conjunction of the statutes modified his view, and seemed to lead him to the same conclusion as Lord Cottenham.

The appeal must be allowed, with costs, and judgment on the demurrer entered for the plaintiff in the Court below.

BURTON, J. A.—Mr. Ferguson admitted very frankly upon the argument that unless this case was distinguishable from *Hunter v. Nockolds*, 1 Mac. & G. 640, the judgment below must be reversed; but he attempted to distinguish it, relying upon the terms of the recital in the recent Act, as making entirely new provisions as to money charged upon land, coupled with the positive language of sec. 11, which declares that no action, suit, or other proceeding shall be brought, either at law or in equity, to recover any sum of money secured by mortgage or otherwise charged upon or payable out of any land, but within ten years next after a present right to receive the same shall have accrued; and he contended that this must be held to apply to such actions as the present, and impliedly to have repealed the 7th sec. of the Consol. Stat. of U. C., ch. 78, in all cases where the covenant was entered into to secure money charged upon land, and to have made a new provision limiting the right to recover upon the covenant to the shorter period mentioned in the recent Act.

The effect, however, of the case to which I have referred, and of numerous other cases, both here and in England, since the passing of the Acts which were consolidated in our statutes as chapters 78 and 88, respectively, was to hold that the latter had reference only to the land on which a demand was secured, the object being to relieve land from the claims of mortgagees and persons holding charges upon it within a reasonable time, which object was not affected by the terms of the other Act, which relates to a different subject, namely, to personal actions only; the construction of the two Acts taken together as regards rent or interest, being that no more than six years' arrears of rent or in-

terest in respect of any sum charged upon or payable out of land or rent should be recovered by any distress action or suit, other than and except in actions of covenant or debt upon specialty, in which cases the limitation was governed by the other statute and fixed at twenty years.

That being the construction placed upon the English Statutes, our own, which were substantially the same, were consolidated as above mentioned, thereby adopting the construction placed upon them.

The recent Act purports to be, and is in fact, an amendment to ch. 88, and is to be read with it. It only professes to deal with land and charges upon it, and limits the time both for the recovery of the land itself and the charges upon it, and does not profess to deal with statute, C. S. U. C., ch. 78, which, by a long course of judicial decisions, had been held to deal with an entirely distinct matter, viz.: the collateral covenant or security for the payment of the money.

The language used in sec. 11 is identical with that of sec. 24 of the former Act, except as to the period of limitation, and having been adopted with the knowledge of the interpretation placed upon the former Act, must be construed in the same manner.

It could scarcely have been intended to deprive a person holding the personal security of a covenant which had been held not to come within ch. 88, of his right to enforce it at any time within the period named in the other statute. It would require express language to deprive him of that right.

The appeal should be allowed, and judgment entered for the plaintiff upon the demurrer.

PATTERSON, J. A., and BLAKE, V. C., concurred.

Appeal allowed.

MASON ET AL. V. JOHN W. BICKLE AND GEORGE BICKLE.

Hire-receipt—Property passing—Estoppel.

The plaintiffs sold to one R. an organ on credit, and received from him a conditional hire-receipt, which acknowledged the receipt of an organ on hire. It contained a stipulation that the signer might purchase the organ for \$130, payable in two equal instalments on the 1st of February, 1875, and the 1st of February, 1876, with interest; and it provided that it should remain the plaintiffs' property on hire until fully paid for, and that they might resume possession on default, although a part of the purchase money might have been paid or a note or notes given on account thereof. This receipt, and a note dated the 17th February, 1874, payable four months after date, were signed by R. Some days afterwards, it was discovered that the receipt bore no date, whereupon the plaintiffs' bookkeeper filled in the 25th February, 1874, the day on which the receipt and note were received by the plaintiffs. The plaintiffs discounted the note with their bankers, and at maturity obtained a renewal and returned it to R. The first instalment was paid, and renewals in whole or in part were given until September, 1875. In May, 1876, R. transferred the organ to G. & B. as security for a debt. He represented that he had paid the purchase money, and produced as evidence the note of February 17, 1874, which had been returned to him on its renewal, and they acted upon this misstatement. The note bore marks of having been discounted, but there was nothing to connect it with the organ. While the organ was in the possession of J. W. B., it was seized by the plaintiffs' agent, and removed to the express office, from which it was taken by G. B., the other defendant, under J. W. B.'s direction, and carried back to the house in which they both lived. Subsequently J. W. B. sold the instrument to G. B.

The learned Judge of the County Court held that the plaintiffs enabled R., by leaving the organ in his possession after default, and leaving the note in his hands with their names on it, to assume the appearance of ownership: that the defendants were thereby induced to take the organ; and that the plaintiffs were estopped from claiming it as against them.

Held, reversing this judgment, that the plaintiffs were not estopped, for there was no representation by the plaintiffs, and no neglect of any duty owing to the defendants.

Held, also, that there was ample evidence of a joint conversion.

Held, also, that the discounting of the note was not a waiver of the plaintiffs' right of property.

Seemle, per Moss, C. J. A., that the insertion of the date in the receipt was an immaterial alteration.

APPEAL from the County Court of York.

This action was brought for the conversion of an organ claimed by the plaintiffs as their property.

In February, 1874, a person named Wilton, residing near Grafton, negotiated with the plaintiffs for the sale of some organs to some of his neighbours. He had not previously acted as an agent for the plaintiffs, but upon this,

his only interview with them, it was arranged that upon the final completion of the proposed sales he should be entitled to a commission of 10 per cent. One of the purchasers proposed to the plaintiffs was a person named Belton Robinson, to whom the plaintiffs, after some discussion with Wilton, agreed to sell an organ at the price of \$130.

The plaintiffs were in the habit, upon making credit sales, of giving the intending purchaser a document, which is termed a conditional hire-receipt. Their book-keeper prepared for signature a form of receipt, except that he did not insert the date, which it was arranged that Wilton should fill in when the receipt was being signed by Robinson. This document acknowledged the receipt from the plaintiffs of an organ, valued at \$130, on hire for a number of months, which was left in blank. It embodied a stipulation that the signer might purchase the organ at the price of \$130, payable in two equal instalments on 1st February, 1875, and 1st February, 1876, with interest at 7 per cent. per annum, but with the condition that until the whole of the purchase money be paid, the organ should remain the property of the plaintiffs on hire, and in default of punctual payment of either instalments or the monthly rental in advance, the plaintiffs might resume possession of the instrument without any previous demand, although a part of the purchase money might have been paid, or a note or notes given on account thereof. The book-keeper also gave Wilton a promissory note for signature by Robinson, by which, if he signed it, he promised to pay to the order of the plaintiffs, \$130 with interest at 7 per cent. per annum, four months after date. The receipt and the note each signed by Robinson, were returned to the plaintiffs by Wilton. The note was dated 17th February, 1874, but the receipt bore no date. These instruments were received by the plaintiffs on the 25th February, and the book-keeper observing the absence of any date to the receipt inserted that day. The organ was then shipped to be delivered to the order of Wilton, from whom it must have been

received by Robinson. The plaintiffs discounted the note with their bankers, and shortly after its maturity, having obtained a renewal, returned it to Robinson. The first instalment was paid, and renewals of the note, whether in whole or in part was not clear, were given until September, 1875.

In May, 1876, Robinson, being indebted to the firm of Guillett & Bickle, offered to transfer to them this organ by way of security. He represented that he had paid the purchase money, and produced as evidence the promissory note of 17th February, 1874, which had been returned to him by the plaintiffs upon his renewing. There were marks upon the note which indicated that it had been discounted. There seemed to be no doubt that Guillett & Bickle took the organ in good faith. It was brought to the house of John W. Bickle, one of the defendants, who was a member of the firm, where it remained until November, 1876, when it was seized during his absence from home by the plaintiffs' agent, and removed to the express office. By the instructions of John W. Bickle, the defendant George Bickle and another brother, carried it off from the express office, and it was ultimately taken back to the house of John Bickle, where it still remained. John Bickle subsequently assumed to sell it to George, who had not then attained his majority, and resided in his house. The price placed upon it was \$85, for which George gave the firm his promissory notes.

The learned Judge, before whom the case was tried without a jury, found that the plaintiffs, by leaving the organ in the possession of Robinson for such a length of time after default, and by furnishing him with the note with their own names endorsed upon it, had enabled him to hold himself forth to the world as the owner of the organ.

He accordingly entered a verdict for the defendants, and a rule *nisi* to enter a verdict for the plaintiffs having been discharged, this appeal was brought.

The case was argued January 7th, 1878 (a).

J. E. Rose, for the appellants. The learned Judge in the Court below was wrong in holding that the appellants were estopped from proving their ownership of the property. The authorities shew that they were under no obligation to institute proceedings against Robinson on default in payment; and they cannot be held bound by any untrue representations made by Robinson, owing to his possession of the note, since it contained nothing to connect it with the transaction in question: *Walker v. Hyman*, 1 App. R. 345. But even if the note had shewn that it related to the purchase of the organ, the appellants would not be estopped, for the respondents, as commercial men, must be taken to have been cognizant of the practice of renewing notes: *McEwan v. Smith*, 2 H. L. C. 309. There was ample evidence of the conversion and of a joint conversion. The defendants admitted a demand and refusal in their examination under the A. J. Act; and at the trial we proved the sale of the organ by one defendant to the other defendant, which was sufficient to shew a joint conversion: *Johnson v. Stear*, 32 L. J. C. P. 130; *Hilbery v. Hatton*, 33 L. J. N. S. Ex. 190. The alteration of the contract was immaterial: *Keane v. Smallbone*, 17 C. B. 179; but even if the contract is invalid by reason of the alteration, it may be used as evidence of the real agreement: *Hutchins v. Scott*, 2 M. & W. 809. If our title to the property had not passed prior to the alteration, it certainly did not pass by the alteration. The evidence shews that the note was given either under the contract, or as an accommodation note, in either of which cases it could not put an end to the contract: *Stevenson v. Rice*, 24 C. P. 245; *Mason v. Johnson*, 27 C. P. 208; nor did the discounting the note terminate the contract, as it was given for the accommodation of the appellants, and not in payment. It was not shewn that Wilton was our agent. Any equity in the case is with us, as our property has been taken to pay a debt due by Robinson to the defendants.

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

H. Cameron, Q. C., for the respondents. It cannot now be denied that Wilton was the appellants' agent, as it was proved he received a commission from them for the sale of the organs. The evidence was not sufficient to shew that the organ was received by Robinson under the hire-receipt. The presumption is, that he concluded the purchase on the 17th, when the note was dated, and afterwards gave the hire-receipt as additional security; and if this was the case, the hire-receipt would be void under the Chattel Mortgage Act. The date, therefore, was a most material alteration of the receipt, since it was so important to know whether it was given after the sale: *Parry v. Nicholson*, 13 M. & W. 778; *Hirschman v. Budd*, L. R. 8 Ex. 171. The appellants are clearly estopped by their conduct in this matter from denying that Robinson was the owner of the safe. By leaving the organ in his possession long after the instalment according to the agreement should have been paid, and by sending him back the note, which did not shew that it was renewed, they placed it in his power to hold himself out to the world as the owner of it: *Walker v. Hyman*, 1 App. R. 345, is distinguishable, as in this case the learned Judge expressly found that the possession of the organ and the production of the note induced the defendants to take the organ. Moreover, the appellants forfeited their rights under the contract by discounting the note. There was no evidence of a joint conversion: *Addison* on Torts, 7th ed., 567.

January 16th, 1878. (a) Moss, C. J. A.—It may be observed that that the form of receipt in question is identical with that which engaged the attention of the Court of Common Pleas in *Mason v. Johnson*, 27 C. P. 208, and not distinguishable from that which came into question before this Court in *Walker v. Hyman*, 1 App. R. 345. These cases conclusively establish that, as between the plaintiffs and Robinson, the organ, if received under this receipt,

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

remained the property of the plaintiffs until the purchase money had been fully paid.

The learned Judge rested his decision upon the ground that the plaintiffs were estopped from asserting against the defendants that the organ was their property. Before considering that question, it will be convenient to dispose of some other points raised on behalf of the defendants.

It is objected that there is no proof of joint conversion, and that therefore, as to one of the defendants, the action must fail. I think that this position is clearly untenable. The defendant George had, by his co-defendant's direction, taken the organ from the plaintiffs' agent, and brought it to his co-defendant's house. That act in itself seems to have been a joint conversion. Then John assumed to sell and George to buy the instrument, and they are both residing in the same house, of which John is the master. In my opinion there could scarcely be a clearer case of joint liability.

Then it is objected that there is no satisfactory proof that the instrument was in fact received by Robinson under the hire-receipt. Wilton was not examined at the trial, and the contention is, that for all that appears he may have delivered it to Robinson absolutely and unconditionally. This is founded upon the circumstance of the note being dated on the 17th, and the receipt on the 25th February. Hence it is argued that the note may have been given first by Robinson upon a contract of absolute sale, and the receipt afterwards obtained from him by way of securing the payment. If that were the case, the document would be invalid under the Chattel Mortgage Act. But I do not think that any such inference can reasonably or fairly be drawn from the evidence. The note and receipt were both sent to the plaintiffs at the same time by Wilton. They were then both signed, and if the date had not been inadvertently omitted from the receipt, it is not probable that this suggestion would ever have been made. I certainly am not disposed to go out of my way to draw inferences in support of these hire-receipts, but the

conclusion seems to me to be irresistible that the note and receipt were signed contemporaneously, and in fact the organ was not despatched until they had been delivered to the plaintiffs.

Then it is objected that the receipt is invalidated by the book-keeper's unauthorized insertion of the date. I incline to the opinion that this was a wholly immaterial addition; but even if material, it does not assist the defendants. The insertion of the date does not diminish the force of the rest of the writing as evidence of the true agreement between the parties. If it had been unexplained by the evidence so as to leave room for the hypothesis that it had not been given until after there had been a completed sale, it might have been of some consequence. But upon no principle that I am able to apprehend, could it be held that this addition to the document had the effect of vesting the property in Robinson, which is the only view that would make it a defence.

It is also urged that the discounting of the note by the plaintiffs was an abandonment or waiver of their right of property. It is a sufficient answer to this that the document provides for the case of notes being given. The note was in truth for the mere accommodation of the plaintiffs, and their dealing with it as they did could not impair their rights against Robinson.

I now proceed to consider the grounds of estoppel upon which the decision of the Court below is based. One element in the defendants' favour is found in this case, which was wanting in *Walker v. Hyman*, 1 App. R. 345. The learned Judge who tried that case found that there was no evidence that the defendant was deceived by Hergert's name being on the safe, which was the circumstance relied upon as constituting an estoppel. But here the learned Judge has expressly found—I quote his language—"that the possession of the organ, the non-payment of rent, and the production of the note for \$130, influenced and induced the defendants to take the organ." It is to be observed that the note bore no apparent reference to the purchase

of the organ. For all that appeared upon it, it might have been given in respect of some other transaction between the plaintiffs and Robinson.

After careful consideration of the able judgment delivered by the learned Judge, I am unable to concur in the opinion that the circumstances of this case have created any estoppel. As my brother Patterson has pointed out in *Walker v. Hyman*, 1 App. R. 360, the rule enunciated in *Pickard v. Sears*, 6 A. & E. 469, with the modification stated in *Freeman v. Cooke*, 2 Ex. 654, has become so well settled as to have almost acquired the character of a maxim. It is unnecessary, however, to refer to the precise language employed in these cases, because I apprehend that the propositions formulated by Mr. Justice Brett, in *Carr v. London & N. W. R. Co.*, L. R. 10 C. P. 307, furnish the tests to which a question of this kind will, for the future, be subjected. If the circumstances of this case do not bring it within any of these propositions, no estoppel can arise.

The first proposition is, that if a man, by his words or conduct, wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist. Now, the belief which the defendants entertained, and upon which they acted, was, that Robinson had paid for the organ. But what was the conduct of the plaintiffs which induced that belief and action? Simply the allowing of Robinson to retain the possession after the time for payment in full had passed, and the returning to him of the promissory note. But there is not a shadow of pretence that they wilfully endeavoured to cause the defendants to believe that the price was paid. They were not in fact guilty of any conduct or communication which was false to their knowledge. The case, therefore, does not fall within the limits of this proposition.

The second proposition is, that if a man, either in express

terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts. It is obvious that this does not affect the plaintiffs. Even if the return of the note be assumed to amount to a representation that it was paid, it is not supposable that the plaintiffs intended it to be acted upon by the defendants or any one else. It certainly was no part of their intention that Robinson should, on the strength of the possession of the note, assume to deal with the organ as its absolute owner. They had no intention beyond that of returning the paper to which he became entitled upon sending the renewal.

The third proposition is, that if a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter intended to act upon it in a particular way, and he with such belief does act in that way to his damage the first is estopped from denying that the facts were as represented. I do not think that a reasonable man would take the possession of the note by Robinson to be equivalent to a representation by the plaintiffs that the price of the piano was paid. The practice of renewing notes is so common that the defendants, as business men, can scarcely have excluded it from their contemplation. Their experience must have taught them that the possession of a note by the maker with the payee's endorsement, by no means demonstrates that it was retired by a cash payment. Indeed, John Bickle, the principal defendant, did not rely solely upon this circumstance, for he obtained the assurances of Robinson's wife and father-in-law, in confirmation of the statement that the instrument was paid for. As the defendants rely upon the fact that the organ was allowed to remain in possession after the time for payment

in full had passed, knowledge of the terms of payment must be attributed to them. With that knowledge they could not possibly have supposed that the note had been retired at maturity by Robinson, for it was payable in four months, while the term of credit extended over nearly two years. That single circumstance was sufficient to deprive the possession of the note of all significance. With still less force can the defendants urge that the production of the note led them, as reasonable men, to believe that the plaintiffs intended that they, or any one else, should act upon that as a representation that they had no further interest in the organ.

The remaining proposition is, that if in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence, calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief to his prejudice, the second cannot be heard afterwards, as against the first, to shew that the state of facts referred to did not exist. That rule is taken from *Swan v. North British Australasian Co.*, 2 H. & C. 182, in which the importance of the qualification introduced by the words, "in the transaction itself which is itself in dispute," is made manifest. I think it is impossible to point at any act of negligence by the plaintiffs within this rule. The return of the note to Robinson was in the ordinary and accustomed course of business. He was entitled to its possession, and in returning it to him they did no more than they had a right to do. In this there was no misconduct, either active or passive. The attempt to make out that their allowing the organ to be still in Robinson's possession in May, although he had made default in payment the previous February, amounted to culpable negligence, needs no refutation.

My respect for the opinion of the learned Judge, has induced me to go through the process of subjecting the case to the touchstone supplied by these propositions; but I

think that the non-affirmance of the judgment might well be put upon the concise ground that the plaintiffs are not shewn to have been guilty of a breach of any duty, either legal or moral, express or implied.

The appeal must be allowed, with costs, and the rule made absolute in the Court below to enter a verdict for the plaintiffs for \$72.

BURTON, J. A.—I agree with the learned Chief Justice that there is ample evidence of a joint conversion, and that the other objections which were urged before us against the right of the plaintiffs to recover, are not entitled to prevail; but as there was a difference of opinion in this Court in *Walker v. Hyman*, 1 App. R. 345, upon the question of estoppel, I think it proper to add a few words to his judgment upon that point alone.

The learned Judge of the County Court admits that the rule should have been made absolute unless this case can be distinguished from the case to which I have referred, but he endeavours to distinguish it by showing that it is in evidence here that the note given up by the plaintiffs to Robinson, was produced by him to Guillett & Bickle, in corroboration of his fraudulent misstatement that the instrument had been paid for, and that they acted upon that statement and took over the property. It seems to me that that fact alone is not sufficient to warrant the conclusion of the learned Judge, and that when the whole of the facts are taken into consideration, this is a much weaker case for the application of the doctrine of estoppel *in pais* than the case of *Walker v. Hyman*. It is one of those cases rather in which the remark of Lord Tenterden, "that hard cases make bad law," seems to be peculiarly applicable.

In *Walker v. Hyman*, the plaintiff had, by a negligent and indiscreet act, one calculated to disarm suspicion, placed it in the power of the hirer of the property more easily to commit a fraud than he otherwise might have done; but it was not shewn there that the purchaser

had acted upon what, it was argued, was a *quasi* representation.

In the present case the learned Judge has found upon the evidence that Guillett & Bickle did act upon the misstatement of Robinson, confirmed as it was apparently by the production of the note which he falsely represented had been paid.

But the element that is wanting here is, that there was no representation by the plaintiffs of any kind, far less one which they meant to be acted upon by the defendants, Guillett & Bickle, who were strangers to them.

The note in itself did not upon its face or otherwise purport to shew that it was given for the organ in question, and the plaintiffs in handing it to Robinson could not reasonably have contemplated that it would be used for the purpose to which it was afterwards fraudulently applied.

Had it even shewn upon its face that it was given for the particular organ, and in such a way that the possession of it by Robinson might raise an inference that the debt had been discharged, I should have retained the opinions which I advanced in *Walker v. Hyman*, 1 App. R. 355, that the plaintiffs would not have been estopped from shewing the actual facts. A third party, to whom such *quasi* representation was not made, cannot, in my opinion, claim the estoppel, unless it was intended or might at least reasonably be contemplated that he would act upon it.

It would be very difficult to carry on the ordinary transactions of life if parties were to be held bound by statements made to persons with whom they were dealing directly, so as to render them responsible for every act that might be built upon them by strangers; it is very different when the declaration is made in such general terms or under such circumstances as to indicate that it was intended to reach or influence a third person. Here the plaintiffs gave up the note on receiving a renewal, never contemplating that an improper use would be made of it.

Nor is there any reason for holding that the plaintiffs, by culpable neglect, have precluded themselves from asserting their title as against these defendants. The neglect, as laid down by Lord Blackburn, must be the neglect of some duty that is owing to the person led into the belief of a certain state of facts existing, upon which he has acted, and not merely neglect of what would be prudent in respect of the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy.

Since writing the foregoing, I have seen a decision of the Common Pleas, *Farmloe v. Bain*, reported in L. R. 1 C. P. Div. 445, which I think fully sustains the view I have endeavoured to express. The defendants in that case had sold to B. & Co. 100 tons of zinc upon certain terms of payment, giving to them at the time of the contract four several documents to the following effect: "We hereby undertake to deliver to your order indorsed hereon, 25 tons merchantable sheet zinc off your contract of this date." Upon the faith of these documents the plaintiffs bought of B. & Co., and paid for 50 tons of the zinc mentioned in the contract. B. & Co. having failed, and the contract price being unpaid, the defendant refused to deliver the zinc.

It was contended there that the plaintiffs thereby intended that the documents should operate as a representation to all persons to whom the same should be shewn, that the goods were the property of B. & Co. freed from all lien on the part of the defendant, and that the plaintiffs had acted upon the faith of them. The goods there, it is true, were not in the possession of the parties holding the certificates. But the judgment proceeds on the ground that they contained no representation of any fact, and the plaintiffs had no right to rely upon them as such a representation; *a fortiori* in the present case the note cannot be regarded in that light.

The appeal should be allowed, with a direction to the Judge of the County Court to make the rule absolute to set aside the verdict, and enter it for the plaintiffs.

PATTERSON, J. A.—In *Walker v. Hyman*, 1 App. R. 357, I discussed at some length the doctrine of estoppel as applied to the class of cases which includes that before us. In that case I took a different view of the effect of the facts in evidence from that acted on by the majority of the Court. In the present case I have no doubt we cannot hold the plaintiffs estopped consistently with the decision in *Walker v. Hyman*. I therefore abstain from a close consideration of the facts. But I do not desire to suggest any doubt of the correctness of the present judgment. On the contrary, the inclination of my opinion is, that while holding, as we must hold, on grounds to which I alluded in *Walker v. Hyman*, that the permission given to Robinson to have possession of the organ, and thus an index of ownership, would not of itself estop the plaintiffs from setting up the true state of the facts; we cannot treat the other fact of allowing Robinson to have the retired note as a representation, either to the defendant or to the public, that the organ was paid for, and so the evidence falls short of what is necessary as a foundation for estoppel.

I agree that the appeal must be allowed.

MORRISON, J. A., concurred.

Appeal allowed.

NORDHEIMER V. ROBINSON.

Mercantile contract—Construction of—Hire-receipt—Functions of Judge or Jury.

The construction of a mercantile contract is for the Court, unless it contains words of a technical or conventional use in the trade to which the contract relates.

The defendant, wishing to buy an organ from the plaintiff, signed a conditional hire-receipt which gave him the right of purchasing the organ for \$129, payable as follows: a cash payment of \$50, and the balance with interest in one year from date; and it stipulated that the instrument should remain the plaintiff's property on hire at \$4 a month until it was fully paid for. The defendant paid the \$50 and obtained the instrument. At the end of the year he was granted an extension of time for the payment of the balance, which was followed by similar indulgences, until at last, being pressed for payment, he offered to pay \$50 cash and give his note for the remainder in four months. The agent communicated this offer to the plaintiff, who replied, "As we require this matter *closed up*, you can accept the \$50, provided he gives at same time a note for balance at four months with interest." The letter also requested him to obtain the hire-receipt, which had been sent to the defendant by mistake. The defendant paid \$50, sent back the hire-receipt, and gave the note as required, and received a receipt for it, "being balance of account for organ." The note was not paid at maturity, and the plaintiff replevied the organ.

The County Court Judge left it to the jury to say whether the note was taken conditionally or on account, or was a settlement of the balance due, so that from thenceforth the organ was to be the defendants.

Held, reversing the judgment, that the construction of the contract was for the Court; and that there was no evidence that the note was given in satisfaction of the unpaid residue of the purchase money.

The mere taking of a note for the purpose of closing an account is not proof that it was taken in payment.

APPEAL from the County Court of Wentworth.

This was an action of replevin for an organ. The only plea was, that the goods were the defendant's and not the plaintiff's, on which issue was joined. The facts are fully stated below in the judgment of Moss, C. J. A. A verdict was found for the defendant, and a rule *nisi* to set it aside was afterwards discharged.

The plaintiff appealed.

The case was argued on the 8th January, 1878. (a)

H. Cameron, Q. C., for the appellant. The rule *nisi* in the Court below only asked for a nonsuit; but if

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this Court think that the verdict was against the weight of evidence, a new trial should be granted under the 33rd section of the A. J. Act, 1874. There was, however, no evidence to go to the jury that the note was accepted by the appellant in satisfaction and discharge of the unpaid residue of the purchase money. It is evident that the parties did not consider that the contract under the hire-receipt was at an end when the note was given, as the appellant requested the respondent to return the hire-receipt which had been sent to him by mistake, and the respondent did so. It is well established that when there is no evidence of the contract except that contained in letters, as in this case, it is the duty of the Court to construe it—the duty of the jury being merely to explain any technical terms or customs of trade contained therein. The Judge in the Court below asked the jury to construe the contract, on the authority of *Shand v. Bowes*, L. R. 2 Q. B. Div. 112; but that case has since been overruled by the House of Lords: L. R. 2 App. Cas. 455. It was not necessary to return the note when the organ was replevied, as there was much more than its value due for hire.

S. Richards, Q. C., for the respondent. If there was any evidence to go to the jury, this Court has no power to disturb the verdict, as it was only moved against on the ground that there was no evidence. The case was properly submitted to the jury, as there were expressions used in the letters, and circumstances connected therewith, which could not have been withdrawn from their consideration. The respondent had never availed himself of the option of purchasing the organ under the original hire receipt; and the evidence shews that the parties entered into an entirely new agreement when he paid the \$50 and gave his note for the balance. The expressions “account closed,” and “balance of account for organ,” used by the appellant, shew that he accepted the note in payment for the organ. At any rate it was for the jury to say in what sense he used these words.

Moss, C. J. A. (a)—The question raised upon this appeal is, whether there was any evidence reasonably fit to be submitted to the jury in support of the defendant's contention. If there was, the verdict in his favour must stand, as the rule *nisi* in the Court below was not moved on the ground that the verdict was against the weight of evidence.

This organ was received by the defendant on the 19th Dec., 1871, under what seems to be known as a conditional hire-receipt, in a form with which all the Courts have had the opportunity of gaining some familiarity of late years. While it professed to hire the instrument to the defendant at \$4 per month, it gave him a right of purchase at the price of \$129, "payable as follows:—a cash payment of \$50, and the balance with interest at seven per cent. in one year from date"; but it expressly stipulated that the instrument should remain the plaintiff's property on hire until payment was fully made, and that in default of punctual payment of any instalment, or of the rental in advance, the plaintiff might resume possession without any previous demand, although a part of the purchase money might have been paid, or a note or notes given on account thereof. It was proved that on 14th Dec., 1871, the defendant and his daughter came and selected the instrument. The sum of \$30 was paid that day on account, and on the 19th Dec., 1871, defendant having paid \$20 more and signed the receipt, took the organ away from Toronto to Streetsville, where he then resided.

After the expiration of the year the plaintiff applied to the defendant by letter for payment of the balance due, and received a reply dated Dec. 25th, 1872, in which the defendant writes: "I received your letter informing me that the money for the organ is due. I have not the money at present." He then asks for indulgence until the 1st of May, and asserts that it is useless to make costs, as that will delay payment. It will be seen that this letter is material in view of the contention mainly pressed upon

us during the argument. The plaintiff appears to have granted him indulgence on some sort of vague promise that he would pay \$25 in the course of the following April. No further payment having been made, the plaintiff would seem, from the letter to which I am about to refer, to have sent an agent to visit the defendant; but there is no further evidence of what occurred on that particular occasion. On 26th December, 1873, the defendant wrote to the plaintiff in the following terms:—

“I received a visit from your agent in Hamilton. He says you must have your money immediately. I cannot pay at present. If you are afraid of your money you can have your organ, which we would be sorry to part with; but if you leave it with us, I will be satisfied to pay interest, or if we have to give it up we will pay your rent. You have money enough on hand to pay rent for some time yet. Please write and let me know what you are going to do with us about it.”

On 4th February, 1874, Messrs. Lancefield Bros., who were acting at that time as plaintiff's agents in Hamilton, and who had had numerous interviews with the plaintiff respecting this organ, wrote to the plaintiff in the following terms:—

“Mr. Robinson has just been in, and says he has \$50 cash he can give you; but he wants to know if you can give him four months' time on the remainder, as he cannot get it before then. If this will do, he will give us the \$50 at once. Please answer by return mail.”

It thus appears that what the defendant was soliciting was, an extension of time for four months upon making a payment of \$50. On the 7th February, 1874, the plaintiff replied to Messrs. Lancefield Bros.:—

“Your favour of the 4th received this morning respecting the transaction with Mr. Robinson. As we require this matter closed up, you can accept the \$50, provided he gives at same time a note for balance at four months with interest. We enclose note for his signature with statement. Send us the note completed and cash. Did he return you the original hire receipt sent him by mistake? If not, get it from him, and send with the money.”

The account of what passed between Lancefield and the defendant in consequence of this letter, is very meagre. Lancefield, who was called for the defendant, says: "I called on defendant for money near a dozen times. We got a note from him. If any bargain was made, it was with me. Defendant said he would give us \$50 and the note if we would not bother him any more. I never said that defendant would have to give the organ." The statement enclosed in plaintiff's letter shewed a balance of \$41.50, for which the defendant gave his promissory note at four months, and Lancefield gave him a receipt in these words:

"Received from Mr. Thomas Robinson, the sum of \$50 cash, and note for \$41.50, payable to the order of A. & S. Nordheimer, at four months, being balance of account for organ." This note was credited to defendant in the ledger, and his account closed. When the note became due and was not retired, the amount was debited.

The only other testimony was the evidence of Peterson, a traveller in the plaintiff's employment. He proved that he called upon the defendant at various times after the note became due, and demanded payment: that the defendant said he was not able to pay, but would do so as soon as he sold some property: that this was in the year 1876: that at the last interview between them, defendant defied him to get the money or the organ: that defendant admitted he owed the money, but would not let the instrument go: and that he took no means to recover the amount due upon the note.

It was admitted at the trial by defendant's counsel, that on 7th February, 1874, the property in the organ was vested in the plaintiff, if the hire receipt "gave it to him"; and that defendant asked for time for payment from time to time, which he got, and that up to the 7th February, 1874, he had not paid the full amount. It was proved that the hire receipt had been sent at one time by mistake to the defendant, which explains the request for its return contained in the letter of 4th of February, 1874, and that it was returned before the defendant's promissory note was.

received by the plaintiff. This is the whole of the testimony, oral or written, adduced at the trial. It was submitted that there was no evidence to go to the jury, that the note of 7th February, 1874, was given in satisfaction, or that it operated as an extinguishment of plaintiff's rights under the hire-receipt.

The learned Judge being of a contrary opinion, left it to the jury, with a charge to which no exception was made, to find whether the note was given in satisfaction of the balance due upon the purchase money. He left to them to "determine whether the note was taken conditionally or on account, or was taken as a settlement of the balance due, and that from thenceforth the organ was to be the defendant's."

The jury having rendered a verdict for the defendant, the learned Judge in term discharged a rule *nisi* obtained by the plaintiff to enter the verdict for him, on the ground that there was no evidence to go to the jury that the defendant's note was given by the defendant and accepted by the plaintiff in satisfaction and discharge of the unpaid residue of the purchase money. The learned Judge, in the course of a carefully prepared judgment, reviewed the facts and examined the authorities which, in his opinion, rendered it proper to submit the case to the jury. He thought that beyond the letters and papers, which it was the function of the Court to construe, there were circumstances to be taken into account, and that the jury were therefore properly asked to pronounce upon the whole case. Especially he thought that he could not have withdrawn from them the question of intention as evidenced by the writings and the surrounding circumstances.

Having carefully considered the authorities commented upon by the learned Judge, and compared their circumstances with the evidence in this case, I am unable to agree with the conclusion at which he has arrived.

The case of *Alexander v. Vanderzee*, L. R. 7 C. P. 530, followed as it was by *Ashforth v. Redford*, L. R. 9 C. P. 20, and by the judgment of the Court of Appeal, in *Shand*

v. *Bowes*, L. R. 2 Q. B. Div. 112, does not authorize the inference that the interpretation of a mercantile contract is necessarily a question for the jury. The learned Judge seems to have been of opinion that this followed from the language of Keating, J., p. 22, which he quotes from *Ashforth v. Redford*: "They are words which are found in a mercantile contract, and I do not know how otherwise their meaning can be ascertained than by leaving it to the jury to interpret them." He then holds that this rule may fairly be applied to the plaintiff with reference to the sense in which he, as a mercantile man, used the expression that the old transaction must "be closed or cancelled," and in which his agent used the expression in the receipt, "balance of account for organ." I may observe, in passing, that I do not find in the plaintiff's letter the expression, "or cancelled." The exact words are: "As we require this matter closed up." But when the language of Keating, J., is considered in connection with the actual circumstances of the case then in judgment, it is plainly no authority for the wide proposition which this isolated passage might seem to state. The Court in that case certainly did not intend to go any further than the decision in *Alexander v. Vanderzee*, L. R. 7 C. P. 530, rendered necessary. In that case it was indeed held by the Exchequer Chamber, (Kelly, C. B., *dubitante*,) that the construction of a particular contract was for the jury; but it does not enumerate any such doctrine as that the construction of mercantile contracts generally belongs to that tribunal. The learned Chief Baron observed that for himself, he would feel disposed to say that, "As it was not suggested at the trial that the words of the contract had any technical meaning, (in which case it would have been a question for the jury), but are words of ordinary use in the English language, its construction was for the Judge." Blackburn, J., remarked that, "Generally speaking, the construction of a written contract is for the Court, unless it contains words of a technical or conventional use in a particular trade, in which case it is for the jury." Lush, J., stated that

the words in question had no definite meaning, whether grammatical or otherwise, and he therefore thought the opinion of the jury was properly asked. It was because the writing in *Ashforth v. Redford*, L. R. 9 C. P. 20, possessed this same characteristic of unintelligibility, as the Court thought, that Mr. Justice Keating used the language already cited. A perusal of his whole judgment puts this beyond cavil. He says pointedly, that apart from mercantile understanding, the words, grammatically speaking, are meaningless, and that therefore the proper course was, to leave it to the jury to say whether or not they had acquired any mercantile meaning. It is unnecessary to consider how far this view may be affected by the judgment in *Shand v. Bowes*, to which I shall presently refer. It is sufficient to observe that it does not govern this case, because there is no ground for the pretence that the language of the writings is unintelligible or grammatically meaningless. When the learned Judge in the Court below pronounced judgment, he was bound by what, in his opinion, had been decided by the Court of Appeal in *Shand v. Bowes*. But the judgment of the House of Lords, reversing the decision of the Court of Appeal, and restoring that of the Queen's Bench, in that case has since been reported in L. R. 2 App. Cas. 455. If the previous decision, on which I have been commenting, had created any fresh doubts or difficulties with respect to the province of Judge or jury, which I by no means intend to affirm, they must be dissipated by that judgment. Lord Cairns emphatically repeated the rule at p. 462, that "So far as the construction of the contract expressed in the words used is concerned, unless there be something peculiar to the words by reason of the custom of the trade to which the contract relates, the construction of the contract is for the Court." He is reported to have said, at p. 462: "The Court it is which, when once it is in possession of the circumstances surrounding the contract, and of any peculiarity of meaning which may be attached by reason of the custom of the trade to any of the words of that contract, has to place the construction upon that contract." In

the course of his judgment, he comments upon the decision in *Alexander v. Vanderzee*, L. R. 7 C. P. 530 ; in which the Court of Appeal seemed to have thought that there was some rule of general application laid down by the Exchequer Chamber. He states that he does not find that there was anything that could be called a rule laid down in that case. Without deciding whether what took place in that case was the course which might properly have been taken with regard to its conduct, he expressly held that, assuming it to be well decided, in the first place it laid down no general rule ; that it proceeded on the finding of the jury in that particular case ; and whether it laid down a rule or not, the rule would not be applicable to a case like that under consideration, in which the facts are different from the facts which occurred there.

Now, in this case all the words used in the writings are plain and unambiguous. There is no ground for conjecturing, and certainly it was not proved, that they have any peculiar or technical sense according to the custom of the trade. The Court was fully placed by the evidence in possession of all the surrounding circumstances, as to which there was not the slightest conflict of testimony. The plaintiff and defendant never had any oral communication with regard to the giving of the note. There was not one disputed fact which could be left to the jury to find, independently of the writings. The plaintiff's witnesses gave no oral testimony in connection with the promissory note. The defendant's witness simply said that if any bargain was made it was with him, but he does not state the terms of any bargain or even affirm that any bargain was actually made.

It is to be borne in mind that the onus lay upon the defendant of establishing that the note was given in satisfaction, and was accepted by the plaintiff upon the understanding that his rights under the hire-receipt were then terminated. No inference whatever against the plaintiff can be drawn from the mere circumstance that a note was given, for that was plainly within the contemplation of

the original contract. In my opinion, not only did the defendant fail to produce evidence of circumstances upon which the jury could, with any semblance of reason, be asked to find in his favour; but the indisputable facts are absolutely conclusive in favour of the plaintiff. When the defendant, through Lancefield, applied for time, he manifestly had no idea of asking the plaintiff to surrender his rights under the receipt. The letter breathes no hint of any such expectation. It would be idle for him to contend that such a consequence was in his contemplation, for the plaintiff in his reply asks Lancefield to procure the return of this very instrument, which was accidentally in defendant's possession, and it is accordingly sent back by the defendant. It appears to me impossible to reconcile this proceeding with his present contention. If it was intended that the effect of giving the note should be to destroy the plaintiff's interest in the organ, and to leave him no recourse for payment of the balance, except to the defendant personally, why did plaintiff make and defendant accede to such a request? For what other purpose can the defendant have supposed the plaintiff desired its possession than that of holding it by way of security? This request, it will be observed, was contained in the very letter which enclosed the note for his signature.

In that letter there is no expression which can even be tortured into evidence that the note was to be accepted in satisfaction. Stress was laid by the learned Judge on the expression of the plaintiff's desire to have the "matter closed up," and on the proposed note being described as 'for balance at four months with interest.' I think that neither expression assists the defendant in the least. The latter is plainly descriptive of the note and no more. It is a mode of stating the amount for which the note was to be given, and which was shewn by the accompanying account. As to the former, if authority is required, reference may be had to the language of Sir J. Robinson, in *Port Darlington Harbour Co. v. Squair*, 18 U. C. R. 535, as to the mere closing of an account by taking a note, as is

done every day in mercantile transactions, not being proof that it was taken in payment or satisfaction. Nor has the receipt given by Lancefield, in its plain, natural and obvious sense, any other significance than that the note was given, and that its amount was the balance remaining due upon the organ. There was nothing in any of these documents for the jury to interpret, and nothing in the surrounding circumstances to alter their natural meaning.

In his argument before us, for the defendant, Mr. Richards strenuously contended that it did not appear from the evidence that the defendant had ever exercised his option of purchasing the organ until the 7th February, 1874, and that therefore it was to be inferred that a new bargain was then made between him and plaintiff's agent, by which he became the absolute owner of the organ upon giving the promissory note, and that his rights were no longer to be measured by the hire-receipt. No suggestion of this kind seems to have been made at the trial or in term.

However, I am of opinion that there is not a shred of evidence in its support. If it had been suggested, I should have thought it equally the duty of the Judge to withdraw the case from the jury. It is, to my mind, perfectly clear that he exercised the option of purchasing on the 19th December, 1871. On the 14th he paid \$30, and on the 19th the remainder of the cash payment requisite to put him in position of a purchaser. There is absolutely no ground for the assumption that these payments were made by way of rent in advance. When the plaintiff at the end of the year applies for payment, it is not on account of rent, but of the purchase money. Indeed, the original amount, if applied upon rent, would not then have been exhausted. The defendant's reply is, that he hasn't the money on hand, obviously meaning the balance of his purchase money. But without again going through the correspondence in detail, I content myself with the observation that the whole of it is entirely consistent with the theory that he put himself in the position of a purchaser under the contract at the very outset.

All that the plaintiff ever did, was to extend the time for payment under the contract, and finally to obtain a note for the purpose of settling the amount of the balance, and putting the transaction in a shape satisfactory to a merchant. All this the contract authorized without any waiver or abandonment of his rights.

I think that the appeal should be allowed, with costs, and the rule *nisi* made absolute to enter a verdict for the plaintiff, with nominal damages of \$2.

BURTON, PATTERSON, and MORRISON, JJ.A., concurred.

RE LINCOLN ELECTION.

Revision of voters' lists—Description of property therein—Addition of income voters—37 Vic. ch. 4, O.

The duty of a Judge in revising the voters' list under 37 Vic. ch. 4, O., only extends to correcting and varying it in respect of the qualification of those who are before him on the revision; and he has no authority to decide who is entitled to vote.

Upon a revision of the voters' list under 37 Vic. ch. 4, O., the Judge, without making any order in accordance with section 11 of that Act, added certain names which were not on the assessment roll, and made no mention in the list of the property or income upon which they were rated.

Held, that the added list was a nullity.

Under 37 Vic. ch. 4, O., the Judge has no power to add to the voters' list in respect of income any persons who are not assessed for income in the last revised assessment roll.

THIS was a case reserved by the registrar for the opinion of Patterson, J. A., and Blake, V. C., the Judges charged with the trial of the election petition, respecting the vote of one Borrowman.

The facts were stated as follows:

1. The name does not appear on the assessment roll.
2. The name was added to the voters' list upon a revision, by the learned Judge of the County Court, under 37 Vic. ch. 4, O.

3. The voter is not rated in respect of any property or income in such list.

4. No order was made and transmitted under section 11 of the Act.

5. On a supplemental collector's roll the name appears as follows :— " Adam Borrowman, Tenant, St. Thomas Ward, \$300." How this \$300 was placed there is explained by the clerk of the municipality in his evidence. No owner is named, and no property is indicated.

The evidence given in the case of Burrows by Rollison, who was the clerk of the municipality, applied also to the case of Borrowman, and was as follows: He produced a list shewing names of parties to be added and struck off the voters' list for St. Catharines, for 1875, which list was attached to a copy of the assessment roll, and was in the handwriting of Mr. Rykert and signed by the Judge. One part of the list stated that the persons whose names were there given were inserted on the list, having been improperly omitted therefrom, without saying in what respect they were improperly omitted; and Borrowman's name was in that part of the list. Another part stated that the persons there named were inserted in the list for income, and were entitled to vote on income, and the names were then given with the wards to which the parties belonged, but no amount of income was mentioned, and no property or amount was mentioned in the former division.

The clerk's account of the insertion of the \$300 on the collector's roll was, that the Judge on the 18th of September handed him the list, which was dated the 14th, and that he noticed that there was neither property nor amount entered, and spoke of this to the Judge, who verbally told him that he had better enter the names at \$300 each. The amount of \$300 was suggested by the clerk, and he named that amount because it was the lowest amount that would entitle to a vote, and it had no reference to the value or supposed value of property. No property was named in the applications.

The Judge was examined, and from his evidence it appeared that for the purpose of the revision of the voters' list, a list of names objected to or claimed to be added was placed before him : that he signified his decision by writing against the names "good," "bad," "reserved," or "disallowed," and that that list, together with the memoranda and minutes of evidence taken at the revision, were handed to Mr. Rykert, and that all that was now forthcoming was the list first mentioned, which was written by Mr. Rykert.

The Judge also stated in his evidence that he had made an order under sec. 11, and had given it to the clerk, and that he had signed a supplemental assessment roll.

The case was argued on the 6th December, 1876.

J. MacLennan, Q. C., and *T. Hodgins*, Q. C., for the petitioner. Borrowman's vote is clearly bad, as his name was not on the assessment roll, and no order was made by the Judge under sec. 11 of 37 Vic., ch. 4. O. There has, therefore, not been that legal assessment which is necessary to entitle a person to exercise the franchise. Nor was the list corrected in accordance with the Statute. 32 Vic., ch. 21, sec. 7, O., shews that the list must contain the property or income on which the vote is allowed as well as the name. Then a certified copy was not handed to the clerk in open Court. The Judge had no power to add those claiming to be entitled to vote in respect of income who were not on the last revised assessment roll, as 37 Vic., ch. 3, sec. 1 expressly enacts that the voter must be assessed for such income on the last revised assessment roll. They referred to *North Victoria Election Case*, 10 U. C. L. J. 217; *Re Voters' List of Goderich*, 36 U. C. R. 88; *Nicholls v. Cumming*, 25 C. P. 169; 39 Vic., ch. 10, sec. 10, O.

M. C. Cameron, Q. C., for the respondent. The only question is, whether, when the Judge has done all that is proper to confer the franchise, the vote is to be excluded because he has omitted to comply with some of the requirements of the Statute. Under sec. 5 of 37 Vic., ch. 4, O., where a person

is entitled to vote, he can object, although his name is not on the assessment roll; and the adjudication of the Judge that he has a right to vote is final.

December 13th, 1876. PATTERSON, J. A.—The clerk's evidence differs in these matters from that of the Judge, and the registrar finds in accordance with the clerk's statement, and I have no doubt finds correctly. A copy of the voters's list with the additions, must have found its way to the clerk of the peace, as the returning officer got his list from the clerk of the peace, but it did not appear by whom the copy was sent to the clerk of the peace.

The statute 37 Vic. ch. 4, (1874) sec. 9, O., enacts that "Immediately after the list has been finally revised and corrected as aforesaid, the Judge shall make in writing and sign a statement in duplicate, setting forth the changes, if any, which he has made in the list:"

"And shall in open Court certify a corrected copy of the list, and deliver a correct copy to the clerk of the municipality:"

And the clerk "shall forthwith transmit to the clerk of the peace a copy of the said corrected list."

There is no fact found by the registrar to shew that every requirement of this section was not complied with, unless the finding that no property or income was mentioned shews that the list signed by the Judge was not a list within the meaning of the section. And I do not observe any evidence pointing to any further omission, except the clerk's evidence that the certified copy was not handed to him in open Court. He says it was handed to him on the 18th September; but I do not find any statement of the date of the sitting of the Court, and I am not sure that the section requires the copy to be handed to the clerk in open Court. My impression is, that that is not the effect of the section.

In my opinion the added list is a nullity. I do not base my opinion upon the impropriety of allowing the

papers to go into the hands of one who represented a political party before the Judge, and allowing him to act as amanuensis, if indeed what was done was not a delegation to him of the judicial functions. If this formed the subject of inquiry, it ought probably to be before another tribunal, as it may be that if we found a formal adjudication of a matter within the jurisdiction of the County Court Judge we could not disturb it, however strongly we might feel that it was wrong, or that it was not to be depended on as truly showing the *bona fide* decision of the Judge. I regard this list of added names as an adjudication that the persons named are entitled to vote. This is not within the jurisdiction of the County Court Judge. He is to revise the list by adding the names omitted, correcting those wrongly stated, or striking out those improperly there, because those omitted have assessable property or assessed income, or because those inserted have it to a greater or smaller amount than stated, or have none. He adjudicates as to their property or income, and in respect of that he corrects the list. The right to vote is the legal consequence only, and not the subject of the adjudication.

The voters' list, prepared by the clerk under 32 Vic. ch. 21, sec. 7, O., (and as it still appears in the Act 39 Vic. ch. 11, O.,) was to state not only the names of those who appeared by the assessment roll to be entitled to vote, but also the property which formed their qualification. On the revision the Judge is (by secs. 5 and 6 of the Act of 1874) to investigate the matter as nearly as may be in the same way as in the case of an appeal from the Court of Revision, and whether the matter on which the right to vote depends, had or had not been brought before the Court of Revision, he is (by sec. 9) to correct the list. The list is still to be an alphabetical list. The work of revision is not done by making a list of added or expunged names. The list is to be changed, and the Judge after correcting it is to make a statement shewing the changes he has made. The whole list must be framed alike. As the original list

is required to have a statement of the property qualification, the amended entries must have it also. Sec. 11, which requires an order to be made for the purpose of enabling the municipality to collect taxes in accordance with the amendments, although requiring something subsequent to the completion of the list, yet aids in shewing what is intended. I think it is perfectly clear from the whole of the enactment that the duty and the jurisdiction of the Judge extends only to his correcting the voters' list by varying it in respect of the property qualification of those whose names are before him on the revision. He is only, it is true, to do this in respect of voters; but there is no judicial authority given to him to decide who is or who is not a voter. He has in this respect only the same ministerial authority which is given to the clerk by the provision which directs him to make from the assessment roll a list of the persons entitled to vote, viz., to see that no one is entered on the list whose property or income is not assessed at the amount which entitles him to vote.

The concluding words of sec. 5 are the only ones calculated to create any doubt of the correctness of this construction of the statute. Those words are "and the decision of the Judge under this Act, in regard to the right of any person to vote, shall be final so far as regards such person." I do not read these words as importing more than that the judgment as to the assessed property is final in its effect on the right to vote. As, for example, a person has procured his property to be assessed above its value, in order to enable him to vote. The Judge decides that the true value is under the amount which qualifies. This decision is final as disqualifying the would-be voter, but he remains liable to pay taxes on the full amount on the roll. I read the words as if in this order, "The decision of the Judge under this Act in regard to the right of any person to vote, shall be final so far as regards such person."

If the Act of 1876, 39 Vic. ch. 11, O., can be properly referred to as assisting the construction of the earlier Acts, it would seem by the insertion of the express provision of

sec. 4, sub-sec. 2, which authorizes complaints on the grounds of disqualification under the Election Law of 1868, to shew that the Legislature did not understand that the Judge had already jurisdiction to decide generally, that an individual was or was not entitled to vote; and the same understanding is perhaps more distinctly shewn by the concluding words of sec. 9, which are added to sec. 9 of the Act of 1874. These words are, "And other questions of qualification shall be raised and decided on Election Petition only."

As to the names added as entitled to vote in respect of income, a further objection was made, viz.: that under 37 Vic. ch. 3, which gave the franchise, the voter must have been assessed for the income in and by the last revised assessment roll of the municipality, and that therefore the Judge could not add to the voters' list, as entitled to vote on income, any one who was not already on the roll. There seems much force in this contention, though it is weakened by the circumstance that the franchise in respect of property is limited in the same way by 32 Vic. ch. 21, sec. 5, sub-sec. 1, O.

I am, however, of opinion that the contention is well founded, and that the Judge cannot add to the voters' list, in respect of income, any persons who are not assessed for income on the last revised assessment roll. The income assessable in any year is that of the year before the taking of the assessment, and if a person liable to income tax does not appear on the revised assessment roll he must have been left off either because he did not originally return his income as taxable, or did not appeal. The omission of his name from the voters' list would be no error. He could not claim to be inserted as a voter on income, unless he was liable to be assessed for income when the assessment was made, that is to say, unless his income for the year before that date, entitled him. There is nothing in the enactment respecting the revision of the voters' lists indicating that income was contemplated as entitling a person to be put on the list. Sec. 11 does not provide for the col-

lection of taxes on income, but only on property; and the Act of 1876, not only preserves the same language as that of 1874, but adds carefully prepared forms which bear out my view; for while the form of voters' list to be prepared by the clerk includes income, all reference to it is absent from those connected with the revision of the lists.

The vote of Borrowman must be disallowed.

BLAKE, V. C.—I concur in the conclusion arrived at by my brother Patterson, in respect of this vote. The requirements of the statute have not, to my mind, been complied with either in letter or spirit. The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise, but at the same time, when we see the particularity with which the Legislature seeks to purify the list that is to shew those entitled to vote, it is impossible that we can set aside all the safeguards with which the Legislature has thought fit to surround the question, through a too strong desire not to deprive an elector of the right of casting his vote for the candidate of his choice. Here it is impossible to call that which has taken place a fulfilment of the demands of the Act. What was to be done by the County Court Judge, was to take the place of that which the Act primarily called on other officers to perform. As nearly as possible parties were to be placed in the position they held had the names been originally placed on the roll. It cannot be said that the means used here for attempting to give Borrowman a vote, substantially comply with what the Legislature called for before this right could be awarded. The paper on which the voter bases his right to vote, prepared and procured as it was, cannot take the place of that carefully prepared alphabetical list, to the correctness of which the clerk is bound to pledge his oath, and which is open to

inspection and correction by those desiring to inspect it. I am of opinion that there was not an adjudication on the questions which the County Court Judge was bound to determine, and that Borrowman has not the right claimed on his behalf.

RE LINCOLN ELECTION.

Voters' list—Description of the property—32 Vic. ch. 21, O.

The right of a voter, whose name has been entered on the voters' list, to exercise the franchise is not destroyed under the 32 Vic. ch. 21, secs. 5, 7, O., by the want of a sufficient or of any description of the real property on which his qualification depends. The provision requiring such description to be inserted is directory only, and does not make it essential to the right to vote; and this, notwithstanding the enactment in subsection 3 of section 7, that the time therein mentioned should be directory only, the maxim *expressio unius*, &c., not being applicable.

Per Moss, C. J. A.—The Interpretation Act, 31 Vic. ch. 1, sec. 6, sub-sec. 2, enacting that the word "shall" is to be construed as imperative, does not introduce any new rule, but is declaratory only of that established by judicial decision.

Per Moss, C. J. A.—The description must be accepted as sufficient where it is the same as that given in the assessment roll, as it was in this case.

THIS was a case stated for the opinion of the Court by Patterson, J. A., and Blake, V. C., the Judges charged with the trial of the Election Petition. The election was held for the electoral division of the County of Lincoln on the 18th and 25th of February, 1876, being respectively the day of nomination and polling day, and the Court for the trial of the petition was held on the 11th of September, 1876, and on other days between that day and the 26th of November, 1877. This case was stated on the 10th of December, 1877.

Upon proceeding with the scrutiny of votes it appeared that the name of William J. Berston, of St. Thomas's Ward, St. Catharines, was entered in the voters' list as follows:—

Name.	Owner.	Tenant.	Occupant.	No. of Lot or other Description.
Berston, William J.	Owner.	Yate Street.

On the Assessment Roll of the same ward his name was thus entered:—

Name of Occupant or other taxable party.	Occupation.	Freeholder H'sholder or Tenant.	Age of Occupant.	No. of Con., St., Square, or other Designation.	Total Value of Real Property
Berston, Wm. J.	Tobacconist.	F.	40	Yate	\$2500

The columns headed "Owners and Address," "No. of lot, house, &c." "No. of acres, feet or other measurement," were not filled up.

It was stated in the case that the entry upon the voters' list was made in respect of the entry of the same name in the assessment roll, and that a plan of that part of the city of St. Catharines in which Berston's property was situate had been filed in the Registry office before the assessment rolls were prepared. The learned Judges being in doubt whether under these circumstances Berston and five others named, whose cases were in a similar position, were legally qualified to vote, requested the opinion of the Court.

The case was argued on the 15th December, 1877. (a)

Bethune, Q. C., with him *C. Rykert*, for the respondent.

This case has been stated for the purpose of determining whether it is or is not necessary that a description of the property, in respect of which a vote is given, should be placed opposite the name on the voters' list. It will be found that the Legislature have uniformly conferred the franchise in connection with real estate. In old days the voter had to swear that he was a freeholder and produce his deeds to the returning officer when he tendered his vote, and the description was then entered in the poll book. This was the law until 1850, when the assessment roll, which shewed the description, was adopted by the Legislature. By the Election Law of 1858, C. S. C., c. 6, however, the qualification was required to appear on the voters' list, which continued to be the law until 1868, when 32 Vic. c. 21, O., was passed. This Act unequivocally

(a) *Present.*—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ.A.

required the property to be mentioned with the name of the voter in every case, whether on the voters' list or on the assessment roll. By sub-sec. 1 of sec. 7, it is enacted that "The clerk of each municipality shall, after the final revision and correction of the assessment rolls in every year, make a correct alphabetical list of all persons entitled to vote therein, with the number of lot or other description of the real property in respect of which each of them is so qualified." The other sections of the Act are equally imperative. Then sub-section 3 of section 7, which declares that the period prescribed as that within which the lists should be completed and delivered is directory only, shews that the statute was intended to be imperative in all other respects, inasmuch as the authorities already established that provisions as to time were directory. Sub-section 10 is negative in its effect, and restrains a person from voting unless his name appears on the list with a description of the property. The form of oath referred to in sec. 41, also proves that the property in respect of which the voter's name is entered on the roll must appear on the list. Our Interpretation Act expressly declares that the word "shall" is imperative; and the cases shew that the Courts have felt constrained so to construe it even where great injustice would be caused: *Regina v. Court of Revision of Cornwall*, 25 U. C. R. 291; *Rex v. Loxdale*, 1 Burr. 447; *Hall v. Hill*, 2 E. & A. 569; *McKune v. Weller*, 11 California 59; *Flounders v. Donner*, 2 C. B. 63; *Onions v. Bowdler*, 5 C. B. 65; *Regina v. Beckwith*, 1 P. R. 283.

It is essential that the property, in respect of which a vote is given, should appear on the list, so that fraudulent votes may be detected. If the list does not shew this, a great obstacle is thrown in the way of purity of elections. For example, where the only description of the property is Yonge street, it would be impossible to strike off the vote without shewing that the voter did not own any lot on Yonge street, thereby necessitating an examination of every title on that street. If the words of the statute can be

departed from so as to allow such a description, then it must be held that it would be sufficiently complied with by merely referring to the city in which the property is.

Hodgins, Q. C., with him, *A. G. Brown*, for the appellants.

The points raised by the respondent on this appeal are not new in English parliamentary law. A long chain of decisions of Courts and election committees has affirmed the validity of voters' lists and assessment rolls similar to those now in question before the Court. Neither the voters' list nor the assessment roll gives the qualification, and the description of the voter's property on the voters' list is not for the purpose of qualification, but to enable the voter to be identified at the poll. The true requisites of the franchise are (1) a *bonâ fide* title to real property as owner, tenant, or occupant; (2) property of a fixed assessed value; and (3) liability to taxation by the entry of the name of the voter and his property on the assessment roll. The 7th section of 32 Vic. c. 21, O., on which the argument against us is principally based, is merely directory of the duties of the clerk, and his omission to perform his duty cannot be held to deprive a voter of his franchise. The Act shews that the voters' list is an alphabetical list of *names*, and it nowhere appears that the description of the property is essential. If the respondent's contention is correct, then any omission to fill up a heading, no matter how unimportant, would invalidate the list. The Legislature can never have intended thus to allow the carelessness of a municipal clerk to destroy the voter's franchise. The 61st section of the Assessment Act provides that the assessment roll as finally passed and certified by the clerk, shall bind all parties concerned, notwithstanding any error in it. If the roll is valid and binding for levying rates, municipal elections, school elections, the selection of jurors, and as to the number of ratepayers to be certified to the government by the clerk to entitle municipalities to share in the clergy reserve moneys, it must be held valid and binding as to parliamentary elections. The English cases shew most conclusively that the objection taken to the list

is wholly untenable. They cited *Stowe v. Joliffe*, L. R. 9 C. P. 446; *Great Western R. W. Co. v. Rogers*, 29 U. C. R. 245; *Seragg v. The Corporation of the City of London*, 26 U. C. R. 263; *Re North Victoria Election*, 37 U. C. R. 234; *Rex v. Inhabitants of Bromyard*, 2 M. & R. 280; *Davis v. Waddington*, 7 M. & G. 37; *Simpson v. Wilkinson*, 7 M. & G. 50; *Nunn v. Denton*, 7 M. & G. 66; *Cooper v. Harris*, 7 M. & G. 97; *Jeffrey v. Kitchener*, 7 M. & G. 99; *Firth v. Widdicombe*, L. R. 7 C. P. 172; *Jones v. Jones*, L. R. 4 C. P. 422; *Birks v. Allison*, 13 C. B. N. S. 24; *Durant v. Kennett*, L. R. 5 C. P. 262; *Grant v. Oxford Local Board*, L. R. 4 Q. B. 9; *Petersfield Case*, Falconer & Fitzherbert 261; *Elliot on Parliamentary Elections*, 324; *Brightly on Elections*, 529; *Brough on Elections*, 11; Falconer & Fitzherbert 454; *Perry and Knapp's Election Cases*, 281, 290, 291; *Barron and Austin's Election Cases*, 499.

January 3rd, 1878. Moss, C. J. A. (a)—The broad question presented for decision is, whether it is necessary to the exercise of the franchise by a person whose name appears on the voters' list, that it should contain a sufficient description of the real property in respect of which he claims to be qualified. It is to be noted that this assessment roll gives no fuller or more perfect description than the list. The latter is substantially a transcript of the former. It may thus become expedient to enquire in the sequel whether upon the strictest view of the law the entry on the list is not completely valid, if it follows the description in the roll, however inadequate that may appear to be for some of the purposes of the assessment.

I am of opinion that the right of a voter whose name has been entered on the voters' list to exercise the franchise is not destroyed by the want of a sufficient description, or any description, of the real property on which his qualification depends.

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON and MORRISON, JJ. A.

The statutory provisions upon which a construction must be placed are specially the 5th and 7th sections of 32 Vic. ch. 21, O.; the former defining the persons who may vote at elections, and the latter providing for the registration of voters. But in the discussion of these sections incidental reference has been made to many other clauses, which have been conceived to throw light upon the question.

The 5th section is that which confers the franchise. It enacts that "The following persons, and no other persons, being of the full age of twenty-one years, and subjects of her Majesty by birth or naturalization, and not being disqualified under the preceding sections, or otherwise by law prevented from voting, shall, *if duly registered* or entered on the last revised and certified list of voters *according to the provisions of this Act*, be entitled to vote at elections of members to serve in the Legislative Assembly of the Province, that is to say:—1. Every male person being actually and *bonâ fide* the owner, tenant, or occupant of real property of the value hereinafter next mentioned, and being entered on the then last revised assessment roll for any city * * as the owner, tenant, or occupant of such real property of the actual value in cities of \$400 * * shall be entitled to vote at elections of members of the Legislative Assembly, subject to the provisions hereinafter contained."

A second sub-section follows, which is not material to the present purpose.

It will be observed that the mode of definition or enumeration adopted in this subordinate clause is that of a positive enactment, which seems to prescribe three conditions as requisite to the existence of the franchise:—Firstly. That the voter shall be interested in real property as owner, tenant, or occupant. Secondly. That this property shall be of a given value at least; and, Thirdly. That he shall be entered on the proper assessment roll as the owner, tenant, or occupant of such real property. The repetition of the words "shall be entitled to vote at elections of members of the Legislative Assembly," may afford room

for the argument that the franchise is conferred as a substantive and potential right, independent of the voters' list.

But this point does not appear to be of any practical importance, because it is clear that in order that the right may be exercised by voting for a candidate at a particular election, the voter's name at the very least must be entered on the list.

The next step then is to examine the provisions of the 7th section. In its first sub-section it enacts that "The clerk of each municipality *shall*, after the final revision and correction of the assessment rolls, in every year, make a correct alphabetical list of all persons entitled to vote therein, *with the number of lot or other description* of the real property in respect of which each of them is so qualified." The 2nd sub-section, in language equally imperative, requires the clerk to certify to the correctness of every list, and to keep them among the records of the municipality, and to deliver a duplicate original to the Clerk of the Peace. There is added the mandate:—"And all such lists shall be completed and delivered as aforesaid, on or before the 15th day of August, in each year." The 10th sub-section provides that "No person shall be admitted to vote unless his name appears on the last list of voters made, certified and delivered to the Clerk of the Peace at least one month before the date of the writ to hold such election; and no question of qualification shall be raised at any such election, except to ascertain whether the party tendering his vote is the same party intended to be designated in the alphabetical list."

The argument for the respondent founded upon a comparison of the two sections is, that the insertion in the list of the number of lot or other description of the real property on which the qualification is based, is essential to due registration or entry; that without such description accompanying his name, a person is not duly registered or entered according to the provisions of the Act, and is therefore disqualified from voting.

In weighing this argument, the first point which attracts

attention is, that the form and contents of the list are prescribed in directions given to the clerk of the municipality. The natural import of the language employed is, that the Legislature was thereby giving instructions for the guidance and government of a public officer. It was laying down rules for the proper mode of discharging a particular duty assigned to that officer. Its immediate concern was not with the object which the performance of that duty was designed to attain. A brief retrospect makes it easy to perceive what that object really was.

Before 1842 the practice had been to have only one polling place for each county or riding. The Act 6 Vic. ch. 1, which provided for holding a separate poll in each township or ward, required the electors to vote at the poll opened for the township or ward within which the property in right of which they were voting should lie. The returning officer was directed to appoint a deputy and a poll clerk for each of these divisions; and all powers and authorities vested in returning officers and necessary for the orderly and proper taking of the polls at elections, were vested in every such deputy, as fully as in his principal. No provision was made for preparing or furnishing to deputies any lists of electors. When a vote was tendered, the elector might be required to take certain oaths touching his qualification and right to vote. If these were taken, the vote was received.

In 1849 the Act 12 Vic. ch. 27 was passed for the purpose of consolidating the statutory provisions then in force for the regulation of the elections of members of the Legislative Assembly. By that Act each deputy was required to record the votes in his poll book by entering the name surname, legal additions, and residence of each elector who should vote, and by shewing by the insertion of the word "proprietor" or the word "tenant," in which of these characters the elector claimed the right to vote. The property qualification on which the right to the suffrage depended was defined. It was provided that any elector when required should, before his vote was recorded, declare the

local situation of the lands or tenements on which he claimed to vote, and that such declaration should be made verbally by his merely mentioning either the street, or square, or concession, or the names of his neighbours. The deputy returning officer, whenever he was required by any candidate or his agent, but in no other case, was bound to state in his poll book the situation of such lands or tenements, by merely entering after the name of the voters, in the column of "description," either the name of the street, or square, or concession, or the names of the neighbours, according to the declaration. Forms of oaths touching the property qualification were prescribed, which any elector might be required to take before voting. The vote was received upon the elector making the necessary declaration and taking the prescribed oath if required.

In 1853, after the establishment of municipal institutions in Upper Canada, the Act was amended by the 16 Vic. ch. 153, entitled, "An Act to extend the elective franchise, and better to define the qualifications of voters in certain electoral divisions by providing a system for the registration of voters." It declared, by sec. 1, that, subject to certain exceptions, every male person, being of full age and a subject of her Majesty, entered on the last revised assessment roll as the owner, tenant, or occupant of real property of certain assessed actual or yearly value, should be entitled to vote. It enacted by sec. 2 that the clerk of each municipality in Upper Canada should, after the final revision and correction of the assessment rolls, forthwith make a correct alphabetical list of all persons entitled to vote within the municipality according to the provisions of the Act, together with the number of the lot or part of lot or other description of the real property in respect of which they were so qualified; and that he should certify to the correctness of his list, and deliver a duplicate to the registrar of the county. It expressly declared that no person should be admitted to vote, unless his name appeared on the last certified list, and that no question of qualification should be raised at an election

except to ascertain whether the party tendering his vote is the same party intended to be designated in the alphabetical list. The returning officer was required to see that every deputy had in his possession a certified copy.

Arrangements varying somewhat in detail were made for Lower Canada. A saving clause was introduced in favour of persons who under the Act of 1849 would be qualified to vote in respect of property lying elsewhere than in Quebec or Montreal, as bounded for municipal purposes. It was made the duty of every assessor in the province to ascertain by the best means in his power both the owner and occupant of all real property entered by him in the roll, and to enter their names, distinguishing them respectively as the owner or occupant. The clerks of the cities, and the secretary-treasurer of each other municipality in which any assessment roll should be made, were required to make out an alphabetical list of the persons who should appear by the assessment roll to be qualified to vote in respect of property mentioned in such assessment roll, distinguishing such persons as appeared qualified as owners from those qualified as tenants or occupants, and a copy of the list was to be kept publicly posted up in the office, such copy being corrected by the clerk or secretary-treasurer when finally revised. A copy of the revised and corrected list was to be furnished to each deputy, and that officer was forbidden to receive the vote of any person as being a voter qualified by reason of his being entered on any assessment roll within the provisions of the Act, unless his name should be found in the copy of the list so furnished.

I have referred to the provisions applicable to Lower Canada, because it seems not unworthy of notice that the officer preparing the alphabetical list was not required to insert any description of property. He was simply to make an alphabetical list of persons appearing from the assessment roll to be qualified *in respect of property mentioned in the roll*.

If the Legislature considered the description of the property an essential feature, it is difficult to conceive why

some provision was not made in Lower, as well as in Upper Canada. I apprehend that there could not be much greater difficulty in procuring descriptions in the one province than in the other.

It may be conjectured that, the frame of the two clauses being different, the reference to the description was accidentally omitted, and its absence was not noticed, because it had not impressed itself upon the legislative mind as an essential or prominent characteristic. If it were deemed highly material to the efficacy of the scheme of registration, and if there were no special reason for its omission from the Lower Canadian part of the system, this was not likely to have occurred. From this a slight inference may perhaps be drawn that the Legislature did not then deem it to be of the essence of voters' lists.

Such an inference, if well founded, would be of importance on account of the great similarity, amounting almost to identity, between the provisions relating to Upper Canada and those contained in the Ontario Act.

The operation of this statute having been suspended by a subsequent Act, it was repealed in 1855 by the Election Franchise Extension Act, which restored the old system. In 1858 it was substantially reenacted by the Act which forms part of the 6th chapter of the C. S. C., but with the additional direction to the clerk or treasurer or secretary-treasurer of a local municipality in Lower Canada: "and shewing the number of the lot, or part of lot, or other description of the real property, in respect of which they are so qualified."

From all this, I think, it is reasonably clear that the scope and intent of this legislation was to introduce an improvement in the machinery for receiving and recording the suffrages of the electors.

It is presumable that the advantages which the experience of the mother country had shewn to be attendant upon registration had not escaped attention. The primary object of instituting the lists was to secure greater efficiency and convenience in conducting the elections.

The Legislature had not directly in view the settlement of the terms upon which the franchise was to be enjoyed. Incidentally that might be the effect of non-observance of the provisions it was making, but it formed no part of its direct object. Certainly it did not enter into its intention that the officer should settle what persons were or were not entitled to the franchise. If that should happen to be in any degree the result of his wrongful or negligent preparation of the lists, it was a part of the price to be paid for the advantages of the system—an unfortunate consequence of the necessity of giving it efficiency by making the list the sole record and table of reference on election day.

To this end it was absolutely essential that the alphabetical list should contain the *name* of every person entitled to vote. It was expedient, but not essential, that it should comprise a description of his real property for the purpose of identification, which was the only question of qualification that could be raised at the election.

Again, this legislation did not create any privileged or exceptional class of voters, or confer upon any persons rights or powers which they did not already possess. On the contrary, it tended to curtail the franchise, which was annexed to an interest in real property and taxation in respect thereof, by the additional requirement of registration.

These considerations, in my opinion, point clearly to the conclusion that the insertion of a description of the real property is not of the essence of the right to vote. If there were no other statutory provisions to be considered, the construction of this provision as directory only would appear to me to rest upon a firm foundation of reason and authority.

I do not propose to review at length the cases upon the question of whether a statutory provision is to be construed as compulsory or as directory, but it is proper to refer to some of the leading decisions in view of an argument advanced by the respondent. It was insisted that the cases

had done no more than follow *Rex v. Loxdale*, 1 Burr. 447, and that the only point it determined was, that in many cases the precise time of doing an act is not essential. I do not think that Lord Mansfield intended to lay down so narrow a proposition. The precise point adjudicated was that an order of justices appointing five overseers for a parish, was bad on the construction of a statute of Elizabeth, directing the nomination of four, three, or two, according to the proportion and greatness of the parish. In pronouncing judgment, his Lordship remarked that there is a known distinction between circumstances which are of the essence of a thing required to be done by an Act of Parliament, and clauses merely directory. He added, apparently by way of illustration, the words upon which so much stress has been laid : "The precise time, in many cases, is not of the essence." It would be an unwarrantable straining of his language to construe this as an opinion that the precise time was the only circumstance not of the essence. The ground of the decision of the Court was, that the justices had no other power to appoint overseers but under the special authority given them by the Act, and that this special authority must be strictly pursued, and could not be exceeded.

It is thus no more than an instance of the application of the rule thus enunciated in *Maxwell* on the Interpretation of Statutes, p. 334 : "In general, then, it seems that where a statute confers a privilege or a power, the regulative provisions which it imposes on its acquisition, or exercise, are essential and imperative."

In *Cole v. Green*, 6 M. & G. 872, the question depended upon the construction of a statute, by which commissioners were empowered to enter into contracts for the performance of work, provided that no such contract should be made for a larger term than three years. Then followed stipulations which, in the opinion of the Court, formed no part of the proviso, that, before any such contract should be entered into, ten days public notice at least should be given : that the contracts should specify the works, the prices, and the

times for completion, and should be signed by three of the commissioners at least, or by their clerk; and that copies should be entered in a book. It was held that these subsequent stipulations were not essential, but directory, and that a contract signed otherwise than in the manner pointed out was not therefore void. In delivering the considered judgment of the Court, Tindal, C. J., said at p. 890: "The statute says that contracts *shall* be signed by the commissioners, or by any three of them, or by their clerk: it does not say that they shall be *void* unless so signed. It appears to us, therefore, that this latter part of the 151st section is directory only, and this view is confirmed by the requisition which next follows—that copies of all such contracts shall be kept in a book. If the former part of the clause is imperative, this must also be so. But it never can be supposed that the Legislature intended to make contracts void if copies are not duly made by the clerk of the commissioners."

In *Rex v. Bromyard*, 2 Man. & Ry. 280, it was decided that a rate which did not specify the property in respect of which the assessment was made, although informal and defective, and liable to be quashed upon appeal, was not illegal and void. This defect had not been pointed out in the notice of appeal to the Court of Quarter Sessions, and it was held that the justices had, therefore, no power to quash the rate. Holroyd, J., remarked: "The statute says 'the causes of appeal *shall* be stated.' There the words are directory; but the statute is not merely directory, for it goes on to say that the Court shall not examine or enquire into any other cause or ground of appeal."

The construction of the Parochial Assessment Act came before the Court in *Regina v. Fordham*, 11 A. & E. 73. It required every poor rate to contain, in addition to any other particular which the form of making out such rate required to be set forth, an account of every particular set forth at the head of the columns in the form given in the schedule to the Act, and the proper officers were to sign the declaration given at the foot of the form. Both these

directions were contained in the same sentence, and were joined together by a copulative conjunction. In both the word "shall" was used. The sentence concluded with the words, "and otherwise the said rate shall be of no force or validity." It was held that these words applied only to the signing of the declaration, and that the provisions as to the numerous particulars relating to the persons and property rated were directory only.

Lord Denman observed that he was led to this conclusion in some degree by considering the enormous consequences which would follow from holding the rate to be invalidated by a failure in any of the minute details prescribed by the Act.

Coleridge, J., put his judgment on the ground that these words might grammatically be confined to the clause immediately preceding, and that where there is as good reason, so far as the language is concerned, for one interpretation as for the other, the consequences of each interpretation may fairly be looked at in order to determine the choice. This case, therefore, does not seem to decide more than that where in the opinion of the Court the legislative intention is not distinctly and unambiguously expressed, suggestions of hardship or inconvenience may be listened to. A strict and severe interpretation of the statute is to be avoided, if possible, when it leads to consequences which the Legislature must be presumed not to have intended.

In *The Liverpool Borough Bank v. Turner*, 2 DeG. F. & J. 502, Lord Campbell said, at p. 507: "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed."

These authorities not only shew that the rule is not so narrow as contended, but support the proposition that the insertion of the description is merely directory.

Nor do I think that the cases which have been cited to us from our own reports, in the least conflict with this conclusion.

The opinion of Sir J. B. Robinson, C. J., in *Regina v. Beckwith*, 1 P. R. 278, so far as it has any bearing, is opposed to the respondent's contention. He held that the provision in 14 & 15 Vic. ch. 109, schedule A, 16, requiring the assessor to distinguish, in separate columns, how much of the amount assessed to each person was freehold, and how much household—which, however, does not bear a sufficient resemblance in language to be of much assistance in the present case—was merely directory. He did, indeed, hold that one Turner, who was only rated on the roll for property of the value of £269, which was not his freehold, but occupied by him as a tenant, was not entitled to vote because he owned certain other real estate for which he was not assessed. This decision proceeded upon the language of schedule A, 11, that the persons entitled to vote at such election should be the freeholders and householders of such village, whose names should be entered on the said roll as rated for ratable real property, held in their own names or the names of their wives, respectively, as proprietors or tenants thereof to the prescribed amount. This explicit declaration was thought by the learned Judge to make it indispensable that the voter should have been assessed on the roll for sufficient property to make up his qualification.

The case of *Regina v. Court of Revision of Cornwall*, 25 U. C. R. 291, is clearly distinguishable. It decided that five days' notice that certain objections to the assessment roll would be tried by the Court of Revision, was insufficient. The Court of Queen's Bench held that the Legislature clearly intended that in all cases of objection by third parties, a notice of complaint must be given to the party complained against, at least six days before the sitting of the Court at which it was to be heard. If such notice were not given, although through the mere default of the clerk, a party could not properly be called upon to

answer the complaint. Reference indeed is made, but as I read the judgment only incidentally, to the Interpretation Act, about which I shall have occasion to speak presently.

The soundness of the decision itself is amply confirmed by *Noseworthy v. Buckland-in-the-Moor*, L. R. 9 C. P. 233, in which the want of compliance with the precise mode of service was much less substantial. It was, however, held that as the service was not in strict conformity with the statute, the voter ought not to have been called upon to prove his qualification.

The general question was a good deal discussed in the Court of Appeal, in *Hall v. Hill*, 2 E. & A. 569, by which it was decided that the provision requiring the co-treasurer, in his warrant for the sale of lands in arrears for taxes, to distinguish those that had been patented from those under lease or license of occupation, was compulsory. But this decision proceeded upon the principle, which is wholly inapplicable to this case, that such sales in effect work a forfeiture of the property of the owner of the lands. In his instructive judgment, Richards, C. J., adopts the language of Turner, L. J., in *Hughes v. Chester & Holyhead Railway*, 7 L. T. N. S. 203, namely: "This is an Act which interferes with private rights and private interests, and ought therefore, according to all the decisions on the subject, to receive a strict construction, so far as these rights and interests are concerned." I have already pointed out that this character cannot be attributed to the Act now under review.

It is worthy of observation that the statutory enactment was express and positive. "The treasurer shall in every warrant so issued, distinguish lands which have been granted. &c." The learned Chief Justice plainly shews that he did not consider the imperative character of the language by any means decisive. On the contrary, he recognizes, without any expression of dissent, that some of the cases decided on the point, as to what provisions in statutes are mandatory and what are directory, would seem to lay down the rule in terms broad enough to sustain

the plaintiff's case. But he observes that the Courts have presented to their minds the peculiar circumstances of each case, and have considered other statutes that have been passed upon the subject. It is only in view of the course of legislation, the injustice that might arise from the omission of the requirement, and the absence of any provision indemnifying sufferers from that omission, that he arrives at his conclusion. I fail to perceive in his judgment the least reason for supposing that he would have disposed of the point before us in a similar manner.

Morgan v. Quesnel, 26 U. C. R. 539, holding that a sale of land for taxes under a warrant issued by the treasurer, without a seal, was invalid, is only another illustration of the same principle. The short ground upon which it is put was that the creation of the power was defective, because it was not created in the manner and form which the statute enjoined.

But the argument was strongly pressed upon us, that whatever might be the true rule if judicial decision formed our guide, the point was settled for our Courts by the Interpretation Act, 31 Vic. ch. 1, O., in which it is enacted by section 6, sub-section 2, that the word "shall" is to be construed as imperative, and the word "may" as permissive. No doubt this rule of interpretation must be accepted by the Court. We must construe the word "shall," as imperative, but how far does this advance the disposition of the case? It seems to me to leave it just where it was before reference was made to the statute. Without that reference the word would naturally and properly be so construed. No one would have disputed that it made it the imperative duty of the clerk to prepare a proper list. When the word is read as imperative, to whom is the command addressed? Moreover, this statutory canon is exceedingly elastic, for the section is introduced with the qualification, "unless it be otherwise provided, or there be something in the context or other provisions thereof indicating a different meaning, or calling for a different construction." No new rule was in fact introduced by this subsection. The citations already

made will shew its identity with that established by judicial decision. The construction which I have indicated as the proper one, having regard specially to the sections in question, seems to be strongly fortified by a reference to other clauses. I think it will be found that in every case the appearance of the name on the list is made the essential feature, and that not even an allusion is made to the description of the property, except in the direction to the clerk.

Even in section 5, when the qualification is being defined, no reference is made to the description. I do not think that so much stress can be laid upon the use of the word "duly," in connection with "registered," as to make it incumbent upon us to hold that a person is not registered at all, if the clerk neglects to attend to the various directions given to him. Suppose for instance that the clerk did not certify in the proper manner to the correctness of a list, or did not keep the certified lists among the records of the municipality, it surely could not be contended that the voters were not duly registered. Yet, these are plainly imperative duties imposed upon the clerk. Sub-section 10, of section 7 itself, which contains the provision for the exclusion of voters who are not registered, does not mention property. It merely says that a person shall not be admitted to vote unless *his name* appears on the list. That clause should be expounded in favour of the voter.

The Court should not introduce, by implication or construction, any condition precedent to his exercise of the franchise. It appears to me that that was the interpretation of the clause present to the mind of the Election Court, when disposing of the objections in *Re North Victoria Election*, 10 U. C. L. J. N. S. 217. Richards, C. J., said, p. 228: "The fact that the name of a person is on the assessment roll or list of voters, is not conclusive as to his right to vote. If his name is on the list, and he takes the oath required by the statute, the returning officer may be bound to record his vote; but that does not seem conclusive under the words of the Ontario Act. It is not being registered that gives the qualification; but though he has the quali-

fication in other respects, he cannot vote unless his name is entered on the proper list."

In sec. 41, it is distinctly enacted that the deputy returning officer at any election shall receive the vote of any person whose *name* he finds in the proper list of voters furnished to him, provided that such person may be required to take the prescribed oath or affirmation. It is also provided that no other oath or affirmation shall be required of any person whose *name* is entered on any such list of voters.

It is clear that the officer would be entirely exceeding his powers, if he refused to receive a vote, because, in his opinion, there was an insufficient description or no description of the real property. In the cases we are now considering, the officer in accordance with his duty did receive the votes. There is no pretence that the voters were not in fact duly qualified. On the contrary, their actual qualification, independent of any question of registry, is established. If they had not been so, their votes might, according to the case just quoted, be now struck off upon the scrutiny.

But is there not something like a *reductio ad absurdum* of the respondent's contention, when its effect is perceived to be that these votes should now be disallowed, although the officer was bound to receive them, and although the voters were in fact possessed of the proper qualifications?

Doubts have been entertained of the wisdom of having permitted any scrutiny after the establishment of voters' lists. I apprehend that the experience of its results, afforded by the proceedings on this petition, have placed the matter beyond the region of doubt; but unquestionably the evils of the practice would be seriously aggravated if leave were given, not only to shew that persons on the voters' list were not in fact duly qualified, but to expunge votes of persons who were in fact duly qualified, because there was some imperfection or omission in the list.

An argument was sought to be founded in favour of the respondent upon the form of oath referred to in the 41st sec-

tion. A person claiming to vote as owner, may be required to swear that he is the person named on the list of voters shewn to him; that at the time of the last final revision and correction of the assessment roll, he was actually, truly, and in good faith, possessed to his own use and benefit as owner of the real estate in respect of which *his name* is entered on the list, and as such entitled to vote at the election. This does not appear to me to assist the respondent. The name is the only thing mentioned as being entered on the list. The real estate is that in respect of which his name is entered—that is, the real estate for which he is assessed, and in respect of which, if of sufficient value, it is the duty of the clerk to register him as a voter.

So in section 8, when dealing with the mode of correcting errors in the list, the language is, in case it appears that the “clerk has wilfully or inadvertently omitted or inserted any name.” In the 11th clause, which imposes a penalty upon the clerk, the breach of duty is made to consist in wilfully omitting or inserting any *name* which ought not to have been inserted or omitted, or otherwise altering or falsifying the same, so that it is not the correct list of all persons entitled to vote according to the assessment roll as finally revised and corrected. There is no trace of any reference to description of the property. Nothing could be stronger to shew that what was prominently in the view of the Legislature was the production of an accurate list of the names of the persons entitled to vote. The correctness of this conclusion is confirmed by an examination of the Ballot Act, 37 Vic. ch. 5, sec. 8. When any person claiming to be entitled to vote presents himself for the purpose of voting, the deputy returning officer is directed to ascertain that the name of such person is entered, or purports to be entered, upon the voters’ list. Upon this he is to record, in the proper columns of the voters’ list, the residence and legal addition of such person. If such person, upon being required, takes the prescribed oath or affirmation, he becomes entitled to receive a ballot paper. It is quite beyond the reach of argument that the officer’s duty

compelled him to deliver ballot papers to the persons whose votes are now questioned. Can we suppose that the Legislature intended a consequence so absurd, as that the votes of persons who had in fact the necessary qualification on the assessment roll, and were entitled to be placed upon the voters' list, should be expunged on a scrutiny on account of an error or omission by the clerk of the municipality, of which the returning officer could not take notice.

Some reliance was placed by the respondent upon the 14th section of the Ballot Act, 37 Vic. ch. 5, providing for the case of a person who claims that his name has been improperly omitted from the list. The deputy returning officer is to enter upon the "tendered votes list" his name, place of residence, and occupation or calling, and also a short description of the property in respect of which he claims to be entitled to have been entered on the voters' list. But this seems to me to prove no more than that the Legislature deemed it convenient for the purpose of better identification that these particulars should be recorded by the officer.

I have now dealt with all the arguments founded upon the language of the statutes in relation to the imperative or directory character of this feature of the list, with one exception.

The respondent, referring to the 3rd sub-sec. of sec. 7, 32 Vic. 21, O., invokes the aid of the maxim *Expressio unius est exclusio alterius*. That section enacts that the period prescribed as that within which the lists shall be completed and delivered shall be directory only, and that nothing therein contained shall render the lists null and void or inoperative in the event of their not being completed and delivered within that period. The contention is, that even if the Legislature had not made this declaration, the requirement would not have been compulsory so as to make the nullification of the lists a consequence of disobedience; that it was already firmly established by judicial decision that time under such circumstances was not of the essence,

and that therefore it must be presumed that the Legislature, in assigning a directory character to this specific detail, intended to declare that no others were of this character.

I do not think that this is a case for the application of the rule. The argument, instead of being strengthened, appears to me to be weakened by the circumstance that the legislation was only declaratory of what judicial exposition had already made law. That rather leads to the conclusion that it was introduced *ex majore cautela*. In view of the importance of preventing the slightest danger of the entire lists being made inoperative, the Legislature did not choose to leave the question open to discussion. The argument that all other requisites were thus made essential to the validity of the lists goes too far. Its result would be to make the neglect of the clerk to certify or to keep the list among the municipal records cause the disfranchisement of the whole body of electors, for these are among the duties which the clerk is required to perform.

If authority were needed to prove that such a construction could never be placed upon the statute, it would be furnished by *Morgan v. Parry*, 17 C. B. 334.

The view I take of this point is illustrated by the course of English legislation.

Section 44 of the Reform Act of 1832, provided that the overseers of the poor should prepare and publish lists of persons entitled to vote, and that in each of the lists the Christian name and surname of every person should be written at full length, together with the nature of his qualification; and that where any person should be entitled to vote in respect of any property, then the name of the street, lane, or other description of the place where such property might be situate, should be specified in the list. In giving each of these directions the word "shall" was used. By section 26 of 6 Vic. ch. 18, it was enacted that no list should be invalidated by reason of its not having been published in every place, and for the full time prescribed by the Act. During the interval between these Acts, there had been difficulty in making the revision, and a want of

uniformity in the views of revising barristers, some of whom, instead of treating the provisions in the Act requiring publication within a certain time and in a particular manner as merely directory, had held that proof of the due performance of these matters was a condition precedent to their right and power to revise the list. It appears therefore that notwithstanding the judicial expositions which made the strict and literal performance of these duties non-essential to the validity of the lists, the Imperial Parliament thought proper to pass an enactment similar to the 3rd sub-section.

There remains for consideration the English cases on election law, to which we have been referred, in addition to those I have already had occasion to notice. It may be conceded that in some of these cases are to be found expressions which at first sight would seem to support the respondent's contention. But I think that when carefully examined, they appear inapplicable. In all these cases two characteristic features are quite apparent. In the first place it is treated as an established principle that the question depends upon registration. Secondly, all the cases arise on appeals from revising barristers. I think that attention to these two circumstances alone, without reference to other special features of the English Acts, will shew that there is no want of harmony between these casual observations and the views I have expressed, and most clearly, that there is no conflict between these decisions and that which I think we should pronounce.

In this country it has been held that—to repeat the language of Richards, C. J., in the North Victoria case—it is not being registered that gives the qualification; but though the voter has the qualification in other respects, he cannot vote unless his *name* is entered in the proper list. But in the English list it was necessary that the qualification should appear. If the qualification, *as stated in the list*, was insufficient in law to entitle the person to vote, the fortieth section of the Registration Act of 6 Vict., made it the duty of the revising barrister to expunge his

name. The qualification and the list were thus practically blended in a manner unknown in our law. Indeed, it appears to me that the voters' list in England bore a greater resemblance to our assessment roll than our voters' list.

Again, the revising barrister had very extensive powers and functions. The intention of the Legislature was, that he, subject to certain exceptions, should discharge the task of deciding in the first instance what persons were entitled to the franchise. He proceeded to deal with the register which had been prepared by the overseers, and upon its basis settled who had the right to vote. His decisions as to questions of fact were final; his decisions upon points of law were open to review in the Common Pleas, but only upon a case stated by himself.

If these points are kept in view, the English cases are easily apprehended. An instance of the use of general expressions, upon which the respondent relies, is furnished by *Bartlett v. Gibbs*, 7 Scott N. R. 609, the earliest of the cases under the Registration Act of 6 Vict., to which we were referred. Tindal, C. J., in pronouncing the judgment of the Court, observed at p. 24 that they thought that "The Legislature intended that the registration list should afford such information of the nature and situation of the premises in respect of the occupation of which each person claimed a right to vote, as would enable the other voters to ascertain by enquiry the sufficiency of the occupation and value of such premises." Hence it was argued that our voters' lists must contain such information. No doubt they ought to contain it. No doubt the object of the Legislature in requiring the clerk to insert a description was to supply this information; but when that is conceded, the respondent has not advanced a step in proving that the vote having been received is bad. Nothing in the judgment of the Court tends to support the conclusion. The point decided was this: An objection having been taken to a qualification on the ground that it consisted in part of the occupation of two houses in succession, while the description of the qualification in the list was

one house, the revising barrister held that the claimant ought to have been registered in respect of both premises, and that he had no power to amend, because he was bound by the statute to require the claimant to prove that he was entitled to have his name inserted in the list in respect of the qualification *described in such list*. The revising barrister accordingly expunged his name, and upon appeal, the Court held he was right. The judgment points out that the statute requires, whether a person is objected to or not, that no evidence shall be given of any other qualification than that which is described in the list. The occupation of the one house would not, under the circumstances, have qualified the claimant, and the resolution of the Court was, that the addition of the other premises to the qualification inserted in the list would be a change in the description of the qualification not warranted by the statute.

The next case is *Flounders v. Donner*, 2 C. B. 63, in which it was held that the revising barrister was right in deciding that the claimant was not entitled to be inserted in the list, upon the ground that the statute required the number of each house constituting the qualification to be contained in the column describing the situation of the property. This proceeded entirely upon the special language of the statute, which had positively required the number of the house; if there were one, to be stated, and required the barrister to expunge the name if the local or other description of the property was omitted, or his place of abode or the nature or description of his qualification insufficiently described for the purpose of identification. The effect of the barrister's finding in this case was, that the description was insufficient without the number, and he expunged the name, as it was his duty to do, unless the matter omitted or insufficiently described was supplied to his satisfaction. It did not appear that any attempt had been made to supply that deficiency, or that the barrister had been asked to amend. He was therefore clearly right in the course he had taken. In the words of Tindal, C. J., p. 69, "The party, therefore, should have given the necessary evidence and called upon the

revising barrister to amend the description. As far as the statement of the case goes, we must assume that no such evidence was given, or none that was satisfactory, and therefore the appellant is not now in a situation to avail himself of the 40th section." This is no authority for the proposition that if his name had not been expunged, and he had voted, the vote would afterwards have been disallowed.

The point decided in *Onions v. Bowdler*, 5 C. B., 65, was very similar. The revising barrister having been asked to amend by changing "house" to "houses," and adding another property, held that he had no power to do so, on the ground that both the qualifying properties should be stated in the list; and this finding was sustained. Indeed, it was no more than a logical sequence of *Bartlett v. Gibbs*—an assertion in a slightly different form of the rule prescribed by the statute, that no evidence should be given of any other qualification than that described in the list, and that the barrister should not be at liberty to change the description of the qualification as it appeared on the list, except for the purpose of clearer and more accurate definition.

The decision in *Birks v. Allison*, 13 C. B. N. S. 24, does not touch the point in question. The revising barrister had altered the description of the nature of the qualification which was given by the word "tenant" merely into "farm, as occupying tenant," for the purpose of more accurately defining the description, although he was himself of opinion that the original description was sufficient. The Court seemed to be of opinion that the original description was sufficient, but in any case they held that the revising barrister was acting strictly in accordance with the statute in making the description clear, and that it was not a case in which he was making a *change* in the qualification in the sense explained in the cases already cited.

Jones v. Jones, L. R. 4 C. P. 422, simply decided that the revising barrister was right in holding sufficient a description which, although not strictly accurate in legal phraseology, was sufficient in a popular sense.

In *Bendle v. Watson*, 25 L. T. N. S. 806, the power of the revising barrister again came into question. No new point is involved in the decision. The sole enquiry was, whether a proposed amendment would have the effect of changing the nature of the description of the qualification, or of correcting an insufficient description; and the Court being of opinion that the latter was its true character, held that the amendment ought to have been made.

None of the numerous cases cited from 7 M. & G. seem to have the slightest application. But even if I thought that the statute made it essential to the validity of the vote that the list should contain some description of the real property, I should be of opinion that the description must be accepted as sufficient, whenever it was the same as that given in the assessment roll. It is plain that the Act contemplates that the roll shall be taken by the clerk as his sole guide in preparing the lists. It was never expected or intended that he should insert any fuller or more definite description.

I am of opinion that our answer to the question of the Judges on the rota for the trial of the case should be, that William J. Berston, Michael Cronin, Richard Hutton, William B. Smith, Jonas Albright, and Patrick O'Brien were all entitled to vote.

BURTON, J.A.—The only question which, upon the argument, appeared to me to call for serious consideration was, the effect of sub-sec. 2 of sec. 6 of the Interpretation Act, coupled with the fact that in the Act respecting the Voters' Lists, R. S. ch. 9, the Legislature had deemed it necessary to provide in sec. 10 that *the times* appointed for the performance by the clerk of the duties required of him shall be directory only to the said clerk, and the non-performance by him of any of the said duties within the times appointed should not render null, void, or inoperative any of the lists in this Act mentioned.

There are abundant authorities to show without the aid of this declaration that the naming of a time for the per-

formance of a duty by a public officer within a certain time is to be considered as directory only to the officer, and not as a limitation of his authority; but it was urged that the Courts were now bound by the terms of the Interpretation Act to place a certain construction upon the word "shall," used in this enactment, and that as by sec. 10 the clauses were declared to be directory *only as regards the time* for the performance of the duties, the other requirements must be strictly carried out.

But it does not follow that because the clauses are imperative as to the officer, the omission of any of the formalities directed in them would invalidate the lists and disfranchise the whole body of electors, or leave it in the power of the clerk to do so. Such consequences could not reasonably be supposed to have been intended; and looking at the several clauses of the Act, and the forms appended to it, it is, I think, manifest that the addition of the property was not considered as of the essence of the requirement; and for the reasons so fully stated by the learned Chief Justice, I agree with him that the answer should be given in the affirmative.

It would perhaps have been better, if it was thought desirable to introduce sec. 10 at all, to extend the declaration contained in it to the form as well as to the time of preparing and completing the lists; but I think we are justified in holding that the lists are not invalidated by the omission of what must be regarded as a matter of convenience rather than of substance.

PATTERSON and MORRISON, JJ. A., concurred.

RE LINCOLN ELECTION.

Contempt of court—Publication tending to influence result of election trial.

All the powers which the Court of Queen's Bench possessed with respect to controverted elections were transferred by 28 Vic. ch. 3, sec 2, O., to the Court of Appeal, which has therefore now the power to punish for contempt in election cases.

Pending an election scrutiny the publisher of a paper at St. Catharines, where the scrutiny was being carried on, copied a letter which purported to have been written by the respondent to the "*Mail*" newspaper of Toronto, commenting very severely on the character and evidence of the petitioners' witnesses, as well as the motives of those prosecuting the petition. Upon a motion to commit the publisher for contempt of Court, he filed an affidavit stating that the letter in question was an answer to an editorial which had appeared in the "*Globe*" newspaper charging the respondent with having improperly interfered with the voters' lists before the elections, and reflecting on his conduct in such a manner as to do him serious injury in St. Catharines where he lived; and that he, deponent, had altered the address of the letter to his own paper, and published the letter as a simple act of justice to, and without the knowledge or consent of, the respondent. He further denied any intention of giving offence to the Court, or of interfering with the fair trial of the case.

Held, that the publication contained expressions which amounted to a contempt of Court; but under the circumstances the Court refused to make any order against the publisher.

Remarks as to the liberty of comment allowed, and the duty of the Court in such cases.

On the 24th of March last, a rule *nisi* was granted requiring Mr. Charles Cliffe, the proprietor and publisher of "The St. Catharines Daily Review," to shew cause why an attachment should not issue against him for his contempt of Court in publishing in his newspaper an article or editorial notice commenting upon the proceedings on the pending trial and scrutiny, and a letter signed, or purporting to be signed, by the respondent, also referring to the same proceedings, and which it was alleged reflected upon the character of and evidence given by the witnesses examined at the trial and during the scrutiny.

The case was argued on the 19th of December, 1877. (a) *M. C. Cameron*, Q. C., for Mr. Cliffe, shewed cause.

T. Hodgins, Q. C., supported the rule.

(a) *Present*.—MOSS, C. J. A. ; BURTON, PATTERSON, and MORRISON, JJ.A.

The facts, together with the arguments and cases cited sufficiently appear in the judgment.

March 4, 1878. (a) Moss, C. J. A., delivered the judgment of the Court.

Upon the argument of this rule, the learned counsel for Mr. Cliffe raised the preliminary objection that this Court does not possess any original jurisdiction in election cases, and that consequently the publication of any articles, however objectionable, was no contempt of the Court of Appeal.

He contended that 36 Vic. ch. 2, sec. 39, O., gives ample protection against the commission of contempts by enabling a single Judge to award the appropriate punishment, and that the correct inference from that section was, that such power was exclusively vested in the single Judge.

We do not think that the statutes support this contention.

The Controverted Elections Act of 1871, gave to the Court of Queen's Bench the same powers, jurisdiction, and authority, with reference to an election petition and the proceedings thereon, as it would have if such petition were an ordinary cause within its jurisdiction. It will not be disputed that there was thus conferred upon that Court, as the Court for the trial of election petitions, the amplest power to punish contempts, not only of a direct character, such as acts of open insult to the Court or the persons of its Judges, or resistance of its power, but also of an indirect or constructive character, such as acts tending to degrade the authority of the Court, or to obstruct the due administration of justice. In an ordinary cause within its jurisdiction it possesses "all such powers and authorities as, by the law of England, are incident to a Superior Court of civil and criminal jurisdiction," and the rights, incidents, and privileges enjoyed and exercised by Her Majesty's Superior Courts of Common Law at Westminster. The contempts which these Courts have power to punish have been classed under three heads: Those which scandalize the Court itself; those which calumniate or ridicule the parties

(a) *Present.*—MOSS, C. J. A.; BURTON, PATTERSON, and MORRISON, JJ. A.

concerned in causes before the Court; and those which prejudice the public before the cause is heard, or the cause itself is before the Court. Under the Controverted Elections Act, 32 Vic. ch. 3, the Judge on the *rota* before whom the trial of the petition was conducted had the same powers, jurisdiction, and authority, as a Judge of one of the Superior Courts and as a Judge at Nisi Prius, and the Court held by him was made a Court of Record. No doubt he possessed a power of punishing contempts committed during the pendency of proceedings before him, although there is no express declaration to that effect in the statute, except in the case of a witness disobeying an order to attend for examination; but the existence of his power did not limit the jurisdiction of the Court itself.

It is, however, insisted that the 39th section of 36 Vic. ch. 2, O., makes such ample provision for preventing and punishing contempts without resorting to the Court of Queen's Bench, that it should be construed as divesting that Court of such power. We cannot assent to that view of its effect. It simply provides that "Any Judge for the time being on the *rota* for the trial of election petitions, or any Judge of the Court of Queen's Bench shall, for the purpose of enforcing obedience to any rule, or for punishing any contempt whatever, have the same power of granting a writ of attachment, to be issued from the Court of Queen's Bench in Term or Vacation, as the Court has in Term time to enforce obedience to any rule or for punishing any contempt whatever." The default in the administration of the law which this enactment was designed to remedy, was the delay that might occur in punishing offenders, and in enforcing obedience, from the necessity of waiting until Term time to move the Court. With the view of enabling the prompt and speedy action so essential to effectiveness in such cases to be taken, the Legislature gave the Judge power to award at any time the process for contempt, which could have been obtained from the Court during its sittings in *banc* only. Neither expressly nor by necessary inference is the Court divested of any of its authorities or

functions. For greater convenience it is provided that one of its Judges or one of the Judges of the *rota* may also exercise one of the powers which it possesses.

The next stage in the course of legislation was, to provide by section 2 of 38 Vic. ch. 3, O., that the duties and powers assigned by the Controverted Elections Act of 1871, and the Election Act of 1873, should, with respect to future elections, belong to the Court of Appeal. It may be, as is argued, that this clause does not affect the powers given to a single Judge by the the Act of 1873, but it certainly does transfer to the Court itself all the powers which the Court of Queen's Bench possessed with respect to controverted elections. We have shewn that the Act of 1873 did not deprive it of the power of dealing with contempts. It follows that such power is now vested in this Court. If the petitioners, but for the Act of 38 Victoria, would have had the right to ask the Court of Queen's Bench to pronounce Mr. Cliffe guilty of a contempt, they are now entitled to claim the protection of this Court.

We proceed to consider the publications in question, premising that at the dates of their appearance, the scrutiny of votes which had been directed by the Election Court was in progress before the registrar.

While complaining of both of the publications, the petitioners appear to feel more especially aggrieved at the letter purporting to be signed by Mr. Rykert.

It appeared in the issue of Mr. Cliffe's paper of 30th December, 1876. It is dated 28th December, 1876, and is headed: "How they do things in Lincoln." In his affidavit filed in answer to this motion on the 15th of June last, Mr. Cliffe offers an explanation of the appearance of the letter. He states that it was copied by him from the "Daily Mail" of Toronto, to the editor of which journal it had been addressed: that it was copied by him without the knowledge of the respondent, with whom he had no conversation whatever in reference thereto: that the respondent was not aware of his intention to publish it until after the actual publication; and that the letter was not

addressed to him as editor of the "Daily Review." He assigns as a reason for publishing the letter, that he had heard many persons speak of the article which appeared in the "Daily Globe" of the 20th December, reflecting in a very severe and unfair manner upon the respondent, and that he felt that in justice to the respondent his reply to the "Globe" (which the letter addressed to the "Mail" was intended to be) should be published in the place where the respondent was so well known. He states that he published the letter solely for the purpose of setting the respondent right before the people, without having the slightest idea that the letter in any way reflected upon the Court, or that it would in any way tend to defeat the ends of justice; and that he looked upon the letter as simply an answer to an article which, in his judgment, was published by the "Globe" for the purpose of damaging the respondent before the people of the county where he lived. Annexed to this affidavit is a number of the issue of the "Globe" containing the article referred to, which is headed: "How they do things in Lincoln." The article criticizes with great severity certain proceedings, with which the writer charges Mr. Rykert, in connection with the revision of voters' lists before the County Judge. It commences in the following terms:—"The judgment of the Court—consisting of Mr. Justice Patterson and Vice-Chancellor Blake—in regard to that extraordinary document, known as 'the supplemental voters' list,' in connection with the Lincoln election trial, affords a further insight into the *modus operandi* of 'the dauntless Conservative champion' and his friends in that constituency. In fact, how any one but Mr. Rykert, or somebody enjoying his patronage, could have been elected, or come near being elected, it is difficult to imagine. That worthy gentleman seems to have had it all his own way. He commanded the inside track of every thing. Even the voters' lists, hedged round with all the protection the law can give them were at his mercy. The clerk of the municipality was his most obedient servant, and the County Judge the

registrar of his edicts. That everybody about him has got into trouble is not so surprising as that he appears to have virtually controlled everybody." The article then goes on to state the effect of the judgment of the Court, which was upon the case of the vote of one Borrowman. It proceeds thus :—" Rollinson, the clerk of the municipality, produced a list containing the names of parties to be added to or struck off the voters' lists for St. Catharines for 1875, which list was attached to a copy of the assessment roll. *It was in the handwriting of Mr. Rykert*, and signed by the Judge. This new or supplementary list embraced two classes of voters : (1) persons whose names had been omitted from the original list, and (2) persons entitled to vote in respect of income. But *nothing appeared to shew why, under the first head, the names were improperly omitted and under the second head, no amount of income was mentioned.*" It then quotes a portion of the judgment of the Court in which it is said, that from the evidence of the County Judge it would appear that for the purpose of the revision of the voters' list, a list of names objected to or claimed to be added was placed before him—that he signified his decision by writing against the names, "good," "bad," "reserved," or "disallowed"; and that that list, together with the memoranda and minutes taken at the revision, were handed to Mr. Rykert; and that all that was forthcoming was the list first mentioned, which is written by Mr. Rykert. In the article the exact language of the Court is professed to be given, and it is not alleged that it was incorrectly quoted. It then refers to the proceedings of the County Judge, and points out that he had exceeded his powers. It comments upon this in the following passage: "When the assumption of those extraordinary powers is found in connection, to use the words of the judgment, 'with the impropriety of allowing the papers to go into the hands of one who represented a political party before the Judge, and allowing him to act as amanuensis, if indeed what was done was not a delegation of judicial functions'—the transaction wears an aspect not only irregu-

lar, but scandalous. It merits far severer treatment than the implied censure conveyed in Mr. Justice Patterson's words, and may demand the intervention of another tribunal." There is next cited a passage from the judgment with respect to persons claiming to be inserted in the list in respect of income. The concluding paragraph is: "This decision affects a considerable number of persons who voted for Mr. Rykert; but that is of less importance than is the further exposure of the way in which they managed things in Lincoln, or the clear exposition of the law affecting the various matters referred to in the judgment we have quoted."

This then is the article to which Mr. Rykert's letter was written as a reply. We have thought it proper to give this full summary of its contents, because it is only fair to presume that but for its appearance this letter would never have been written, and because it is pressed upon us that in publishing the letter without the writer's knowledge or consent, Mr. Cliffe was animated solely by a spirit of justice towards a public man unfairly assailed, and by a desire to give his defence publicity in his own neighbourhood. It is perhaps to be regretted that these being his motives, he did not communicate with Mr. Rykert before venturing upon the step of altering the address of the letter, and placing that gentleman apparently in the position of having authorized its insertion. It is only reasonable to presume that when his feelings were such as he has described, and when he felt warranted in taking such a liberty, the relations between him and Mr. Rykert were sufficiently close and friendly to apprise the latter that the columns of the "Review" would not be closed against his vindication. It might have occurred to Mr. Cliffe that it could scarcely be any fear that he would be numbered among rejected correspondents, which led to Mr. Rykert's action in sending the letter to the "Mail" only. If he had taken the simple, easy, and natural step of consulting Mr. Rykert, the present controversy might have been avoided, for it is presumable that he would have learned the reasons which induced that

gentleman to refrain from addressing the communication to him, as well as to the editor of the "Mail."

It is no part of our duty to pronounce a formal judicial opinion upon the character of the "Globe" editorial. It was not incumbent upon the petitioners to enter upon its defence, if any were needed, because they were not accountable for it. But as it is collaterally brought before us, and made a prominent feature of the justification, it appears proper to observe that it was eminently calculated to provoke a rejoinder, and that of no mild character. Its strictures are severe; its language is pungent; its tone was calculated to be highly exasperating to Mr. Rykert and his friends. But it is not shewn that any of the extracts from the judgment were misquoted or garbled, or that things are alleged as facts which the findings did not support. It may be that if the reviewer were reviewed, it could be shewn that his criticisms were not warranted by the judgment; but we cannot say, from anything appearing before us, that the article exceeded the bounds of legitimate criticism. Still we think that considerable latitude was allowable to Mr. Rykert in any reply he might think proper to make. We ought to decline to weigh, in nice scales, the language in which his feelings might lead him to indulge. The strongest denial of the charges or inferences which he might feel at liberty to make, the severest scrutiny of the arguments and even of the motives of the editor, the most vigorous repudiation of wrong-doing, the most vehement assertion of innocence of aught beyond what the Court had found established—all were permissible, and not to be visited with punishment by any Court. Intemperance of language, or violence of invective, or severity of retort, would be readily condoned, if used in the attempt to vindicate his reputation and repel his assailant. It is in this spirit that we think the letter of Mr. Rykert ought to be viewed. We shall consider, in the first place, its character *per se*, or as it would appear to the Court if its author were being made responsible for its publication, and in the next place, the effect of the circumstances bearing upon Mr. Cliffe's connection with it.

It opens with a statement to the effect that the writer would not have taken the trouble on his own account to answer the charges and accusations made in the editorial, but that he does so because the public officers of the county had been accused, not only of a neglect of duty, but of acts which, if done, would demand an immediate investigation. He subdivides the statements of the editorial into five heads, which he notices *seriatim*, denying or explaining each of them. He also explains that he got the revised list copied at the request of the Judge, made in consequence of press of business, and that it was returned to the Judge the next morning with the original memoranda. He also enters into details for the purpose of shewing the correctness of the copy he had made, and that the disappearance of the other papers was not attributable to him; but, as he not obscurely hints, to his opponents. With all this, no fault could be found. It was all by way of answer to the editorial. If passages couched in strong language can be pointed out, it is no matter for surprise. It had been insinuated or charged that he had dealt unfairly with the lists. In the polemics of party, it was of course that he should retort with a counter-charge against his opponents. But Mr. Rykert did not rest content with this vindication of himself and this assault upon his adversaries. He proceeded to refer to what had occurred on the scrutiny which was still pending in the following manner:—

“The evidence before the registrar has developed the fact that the most unscrupulous means were resorted to by personation and otherwise to reduce my majority, and it is not to be wondered at that every technical objection is taken to prevent further exposures. If I have not a clear majority of legal votes, why is it that my opponents are unwilling that each party should file additional lists of objected votes? They know full well that if there were a scrutiny of votes in the strict sense of the word, my majority would be very largely increased. I notice, however,

in "Big Push's" very elaborate article, that nothing is said about the very questionable means by which my opponents seek to reduce my majority. The notorious "Cherry Alley Gang," who have been a terror to the town for years—witnesses fresh from the penitentiary—coloured boys who swore they were paid by Mr. Brown to swear *good* against me—others who have admitted that the greater part of their lives has been spent either in gaol or in evading justice—all these have been pressed into the service to swear away the franchise of honest men, and not one word of disapprobation has fallen from the greatest slanderer of the age."

These passages certainly seem to transgress the limits of fair legitimate controversy, and to be calculated, even if they were not designed, to obstruct the proper administration of justice. It is universally admitted that it is essential to the usefulness of a Court that all attempts which may be made during a trial to impair public confidence in its integrity, to slander its proceedings, or to impugn the honour or motives of its Judges, should be checked and repressed. But it is scarcely less important to prevent a litigant from obstructing the even flow of justice by publicly vilifying his opponent, assailing his character, impugning his conduct in the suit, and attacking his witnesses.

It seems to us that *primâ facie* the closing paragraphs of this publication were calculated to interfere with the fair prosecution of the trial, and that the charges made against the witnesses who had been examined were likely to deter others from giving their evidence. Most men, however innocent of wrong, shrink from the prospect of being included among the subjects of such attacks. The difficulty of the task of investigating the truth in election cases—already serious enough—would be greatly increased, if such denunciations of witnesses by one side or the other were winked at or tolerated. The honest, but nervous and timid witness, would seek anxiously to escape the ordeal

of an examination which might expose him to public abuse ; and the machinery of justice would be clogged and impeded.

A short reference to a few salient cases will shew clearly the aspect in which Courts have regarded publications of this description.

In 2 Atk. 469, upon a motion to commit the printers of the "Champion" and of the "St. James's Evening Post," Lord Hardwicke observed, pp. 469, 471: "Nothing is more incumbent upon the Courts of justice than to preserve their proceedings from being misrepresented ; nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons, concerned as parties in causes, before the cause is finally heard. * * There may be likewise a contempt of this Court in abusing parties who are concerned in causes here. There may be also a contempt of this Court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves and their character." Referring to another case he said at p. 471: "The contempt of this Court was prejudicing the world with regard to the merits of the cause before it was heard." This language has been very frequently cited with the highest respect and approval by the Courts, both of law and equity.

In *Little v. Thompson*, 2 Beav. 129, attacks upon the plaintiff and his witnesses had been published during the pendency of the suit. In these the case was represented as a persecution in which the defendant was suffering under the influence of treachery and falsehood ; that the persecution was founded on falsehood, and the whole weight of the case against him was supported by falsehood. Lord Langdale said, at p. 131: "If parties in the prosecution of their rights are to be exposed to this species of attack, and are to be placed in such a situation that they cannot safely

proceed in the defence of their rights, and if witnesses are in this way deterred from coming forward in aid of legal proceedings, it will be impossible that justice can be administered." The editor made an affidavit denying any intention of giving offence to the Court, or of influencing or obstructing public justice, or prejudicing the case of the plaintiff, and stating that he had acted under the conviction that he was advancing and promoting the cause of truth and justice, and that he had erred in ignorance and without any improper motive or intention. Lord Langdale dealt with this excuse by holding that whatever might have been the publisher's belief at the time he published the articles, that belief would not protect him from the consequences, if his publication had been of such a nature as to disturb the free course of justice. His Lordship was clearly of opinion that the publication was a contempt of Court.

In *Tichborne v. Mostyn*, L. R. 7 Eq. 55, a motion was made to commit the publisher of the "Pall Mall Gazette" for contempt in publishing an abstract of affidavits filed on behalf of the plaintiff, with comments calculated to prejudice the plaintiff's case. The article in question expressed the opinion that many of the affidavits were important enough, if the defendants could endure cross-examination in the witness-box, and that many of them were "obviously false, absurd, and worthless, being those of persons who never having seen the claimant before he left England, are nevertheless convinced that he is the person he claims to be." Lord Hatherley, then Vice Chancellor, had no hesitation in pronouncing this a gross contempt of Court. His language seems to be extremely applicable to the case we are considering. "This Court and every tribunal which has to administer justice, are bound to protect every suitor from such an attempt to pervert the course of justice, and against that which can affect the minds of persons who might be willing to give evidence in the case, and may prevent them from coming forward when they find that

they will expose themselves to criticisms of this description, obviously coming from a quarter having a considerable bias." Again he remarks, at p. 57: "Not only is the bias of the writer's mind otherwise indicated; but the observation is made that many of the claimant's witnesses would be important if they could bear cross-examination in the witness-box, and that many of their statements were obviously false, absurd, and worthless. It appears to me plain and manifest, that there has been a most improper attempt to interfere with the administration of justice." It is scarcely necessary to observe that the distinguished Judge, whose language we have been citing, was not affected by any fear that his own mind could be influenced in the smallest degree by this article, when it became his duty to form a judgment upon the merits of the case. It was not a case in which the Court required protection, but one in which the Court was bound to protect the suitor. Certainly the attack upon the witnesses was no stronger than in the letter before us.

In *Daw v. Eley*, L. R. 7 Eq. 49, Lord Romilly says, that parties ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case.

The article which was held to be a contempt in *Felkin v. Herbert*, 9 L. T. N. S. 635, was characterized by the Court as ludicrous and contemptible, and utterly incapable of influencing the mind of a Judge even if he were to read it. But the judgment proceeds, at p. 637: "The question, however, is not whether it tends to pervert the course of justice by perverting the mind of the Judge, but whether there is not a degree of mischief calculated to subvert the course of justice by intimidating and holding up to public ridicule the persons who have made these affidavits in the suit." In *Tichborne v. Tichborne*, 22 L. T. N. S. 55, Stuart, V. C., is reported to have said, at p. 57: "Whatever tends to prejudice a case—whatever matter is published to

the world referring to the parties to the litigation and to the subject matter of the litigation in such a way as excites a prejudice, is a contempt of this Court." We may refer also to the observations of Blackburn, J., in *Skipworth's Case*, L. R. 9 Q. B. 231.

In *Folkard* on Slander, 4th ed., (p. 639), the law is thus summarized: "The Court will discountenance any attempt to prejudice mankind against the merits of a case before it has been heard, and will protect every suitor against that which can affect the minds of persons who might be willing to give evidence, and which might prevent persons from so doing." The same rule is adopted in the Courts of the United States. In his Commentaries on the Criminal Law, 5th ed., vol. ii., p. 259, Mr. Bishop, an author of high repute for learning and accuracy, lays it down that any publication, whether by parties or strangers, relating to a cause in Court, tending to prejudice the public as to its merits, and to corrupt and embarrass the administration of justice, or reflecting on the witnesses, may be visited as a contempt.

If these attacks upon the witnesses and the mode of prosecuting the petition could be deemed topics apparently, albeit somewhat remotely, connected, with the respondent's vindication from the strictures of the editorial, the Court ought not, we think, to interpose summarily, even if in strict law a contempt had been committed. There is no doubt some difficulty, as has been urged, in holding that self-protection suggested these attacks, when we reflect that the gist of the charge against him was, that he had before the election improperly interfered with the voters' lists and controlled the County officials. It would perhaps be difficult to establish that they were no more than a retort upon the editor. Still we must keep in view the circumstances under which the letter originated. At the least, it must be conceded in Mr. Rykert's favour that his direct purpose was to answer the editorial, and that one, even if not the only, object of the closing paragraph was to

shew that while the journalist animadverted strongly upon the respondent and his friends, he omitted all reference to the conduct of Mr. Rykert's political opponents, and the character of the witnesses they had called during the prosecution. Coupling these considerations and the principles deducible from the authorities, we are of opinion that if Mr. Rykert were chargeable with the publication in this newspaper, it would be incumbent upon him to satisfy the Court that his sole purpose was self-vindication, and that he had no intention of obstructing or interfering with the fair trial of the cause, and that this was not the necessary or natural result of his publication. This might have been a difficult task. It is only fair to Mr. Rykert to notice that it was one he never assumed. His letter was written to the Toronto "Mail," to which different considerations are applicable. It is much easier to understand how he could suppose that such language might be used in a letter thus published, than in one appearing in the neighbourhood where the witnesses resided.

Then, if *prima facie* at least the publication of such a letter by Mr. Rykert would have been a contempt, the next question is, what position does Mr. Cliffe occupy?

After much consideration, we have arrived at the conclusion that the publication does not call upon us to make this rule absolute. We cannot overlook the circumstance that where a journalist has merely copied a publication from another journal, considerable allowance must be made for his position.

It is true, as has been urged, that Mr. Cliffe, by altering the address of the letter, assumed, in a certain sense, the full responsibility of an original publication. Still, we do not think that this should be pressed against him with much severity. He has distinctly denied upon oath the existence of any improper motives, or of any intention except that of vindicating a public man, and although it is needless to say that such denials cannot, in a case of contempt, be accepted as a necessarily sufficient answer, they are

entitled to great weight. There may be cases in which the animus is made so plain by the language used, and the attendant circumstances, that the most emphatic denial is absolutely worthless. We are not prepared to pronounce the present to be such a case.

While we accede to the contention of the petitioners that it is the duty of the Court to assert its summary jurisdiction in a proper case, we are of opinion that the extraordinary power of punishing summarily as for a contempt an act not committed in the face of the Court, ought, as a rule only, to be exercised, where it appears that the intention was to obstruct or interfere with the due administration of justice, or where such a result would be the natural or necessary consequence of the conduct in question.

The power of the Court should be unhesitatingly exerted, when the contempt is of such a character that a remedy of a completely effectual kind can only be obtained by speedy and summary interference. We are not disposed to encourage applications in every case, where something may have been published which only so far transgresses the rules of law as to be a technical contempt, but is wholly unattended with mischievous consequences. Where the act complained of is of that character, the complainant may safely be left to the ordinary remedies which the law has provided.

Adopting this view of the principles which should guide the Court in the exercise of this summary jurisdiction, we do not consider the editorial complained of to be worthy of serious notice. It is sufficient to observe that while in our opinion the dignity of journalism would be better consulted by refraining from such accusations, we are not prepared to hold that, under the circumstance, it is of sufficient importance to be visited with punishment as a contempt. It arose out of a request said to be made by the petitioner's counsel to the respondent for a consent to the continuance of the scrutiny during the session of the Legislature. We have no concern with the question of good

taste involved in the publishing of such a conversation, or in making it the occasion for the assertion that the opposite party "are responsible for inaugurating and continuing one of the most disgraceful legal persecutions ever started in Canada, and that solely and only for the purpose of giving the representation of Lincoln to the man having the largest bank account." If respondent's counsel chose to make such an application, he ran the risk of its being contumeliously rejected, and treated as the offspring of sinister motives. In election cases great latitude must be allowed to public journalists in the language of comments for the making of which any opportunity presents itself. If an editor, advocating the political views of a respondent, is led to refer to the motives of the petitioner or his friends, he need not be expected to class them among those that are lofty and pure. But it must be observed that the intention of the law is, that these contests should as far as possible, be conducted in the same manner and be governed by the same rules, as private controversies. Upon these rules the journalist who is desirous of upholding the dignity of his profession, and of lending to the extent of his ability the powerful aid of the press to the maintenance of civil order, will carefully abstain from trenching. He will acknowledge it to be an unmixed evil to intermingle the heated discussions of the political arena with the calm deliberations of the Courts. He will therefore deem it a sacred duty during the progress of a trial to refrain from all injurious comments or angry aspersions. A fair, truthful, and impartial account of the actual proceedings at the trial is not only permissible but of public advantage. The people of a free country have a deep interest in being made acquainted with what is taking place in the Courts of Justice during election trials, and the newspaper is the medium through which this information must be disseminated. A full and minute report of these proceedings is therefore to be encouraged, not repressed. When to this is added that the journalist has an undoubted right after the

final termination of the case, to criticise in a fair and candid spirit all the incidents of the trial and the judgment—nay, in the same spirit to dissect the public conduct of all concerned in the trial, including the Judges themselves—it is evident the rule does not abridge or curtail the just liberty of the press.

With the view of meeting Mr. Cliffe's assertion of innocence of motive, and his disclaimer of any intention to reflect upon the Court, to interfere with the fair prosecution of the petition, or to commit any contempt, the petitioners have filed affidavits in reply verifying other numbers of his paper, issued before he made his affidavit. It is argued that it is impossible to reconcile the tone of these articles with the existence of the sentiments by which he now declares himself to have been solely animated.

If we must refer to these articles as construing or throwing light upon the motives of Mr. Cliffe in publishing the letter and editorial now in question, we are constrained to say that reconciliation seems difficult. In a number published before the appearance of the "Globe" editorial, there is an article upon the scrutiny, which to any impartial mind must appear to be of the most indefensible character. It begins with the statement that every auditor at the scrutiny trial is struck, more or less frequently, with the uniqueness of the Registrar's rulings, and ends with the sentence: "It is a great round about to secure electoral purity; but it is the one that the Registrar appointed by a Grit Government to carry out Grit law, says must be adopted when the question of a Grit vote is at stake."

In the issue of the 28th of March we find this passage: "If we were to desire a balm for curiosity it would be to see Registrar Brough defining nationality, citizenship, and occupancy before an honourable Court. Mr. Hodgins's friendly promptings, would then come in most charmingly." In the issue of the 1st of April there is an article of some length headed: "The scrutiny and its management," containing charges and insinuations against a prominent friend

of the petitioner, against his counsel, and against the registrar. In the issue of the 10th of April, after he had been served with the rule *nisi*, and even after he had written an article vindicating his conduct, while professing to give a report of what was taking place at the trial, he writes that the petitioner's counsel "as usual caught the Registrar's ear, or rather two ears." The same number contains an editorial paragraph, evidently imputing partiality to the Registrar. Anything more wanting in propriety or decorum than all this, it is impossible to conceive. The Registrar is an officer of the Court, and not of the Government. During the conduct of a scrutiny he is discharging judicial duties of a difficult character. The law has provided ample means for correcting his faults of omission or commission. If his rulings are erroneous, they may be reversed. If he is partial or unjust, he may be removed. Of this a gentleman of Mr. Cliffe's education and position must have been aware. It is, therefore, matter not only of regret, but of surprise, that he should have supposed he was discharging a public duty when he was attacking a judicial officer. If such a course were generally pursued by the press, a dangerous blow would be struck at that feeling of respect for the law and its institutions, which is now deep-seated among our people, and forms one of the surest foundations of the commonwealth. We have not the slightest apprehension that this course will be approved of or imitated by the press. All who desire to see the law administered with firmness, vigour, and impartiality, and all who are charged with its administration, are alike entitled to look with confidence for the support and assistance of that which is now the chief instrument of popular instruction—at least in political matters—and the most potent influence in giving tone and direction to public sentiment. But while these articles appear to us to be highly reprehensible, we do not think they can alter our judgment upon this application. Even if we are unable to conceive

how they could have been justified, we must bear in mind that they have not formed the subject of a distinct and positive accusation. Mr. Cliffe may have some answer which does not suggest itself to our minds. He has had no opportunity of explaining these articles, and we are clear that it would serve no useful purpose to suspend judgment in order that he might furnish a reply.

We certainly cannot, without giving him that opportunity, visit him with a punishment which we should otherwise withhold. But as Mr. Cliffe certainly brought this application upon himself, and as we cannot exculpate him from blame, we do not discharge the rule, but follow the course taken in England under such circumstances by declining to make any order in the matter.

THE CANADA FIRE MARINE INSURANCE COMPANY V. THE
NORTHERN INSURANCE COMPANY OF ABERDEEN AND
LONDON.

Re-insurance—Misrepresentation.

The plaintiffs' agent re-insured the defendants, another insurance company, for a portion of their risk on property belonging to H. & Co., in November, 1875, being well acquainted with the property and every circumstance necessary to consider in deciding whether to accept or reject the risk. He renewed the insurance on the 10th March, 1876, at eight per cent., but swore that he was induced to accept seven per cent. premium on the 25th April, owing to a misrepresentation by the defendants' agent that the defendants and the other insurance companies holding risks on the property had reduced their rate from eight to seven per cent.

Held, that such representation, if made, could form no ground for avoiding the policy, inasmuch as the plaintiffs had already accepted the risk on their own judgment of its nature, and the misrepresentation could only have had the effect of inducing them to take a lower premium.

One of the conditions of the policy was : " This re-insurance is subject to the same specifications, terms and conditions as policy No. 434,292 of the Northern which it re-insures ; it being well understood that the Northern Insurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto on other parts " of the property. The defendants then held three policies on different portions of H. & Co.'s property, that which they re-insured in full with the plaintiffs for \$2,800, and two others for \$2,500 each.

It happened that before the fire occurred one of the defendants' policies for \$2,500 expired, so that at the time of the fire they only had a risk on the property of \$2,500, over and above their re-insurance. H. & Co. did not desire to renew the other policy, and defendants paid the whole \$2,500 on the policy in force, while the claim against the plaintiffs was only \$2,200.

Held, that the defendants had not violated the condition, as the effect of it merely was that they were not to re-insure so as to reduce their own risk below the stipulated amount.

Held, also, that the difference in the rate of premium was not such a departure from the " specifications, terms, and conditions," of the defendants' policy as to vitiate the plaintiffs' policy.

THIS was an appeal by the defendants from a decree of Proudfoot, V. C., setting aside a policy of insurance granted by the plaintiffs, on the ground that it was obtained by the misrepresentation of an agent of the defendants.

The policy in question was numbered 6501, and was dated the 28th day of October, 1876. It witnessed that the plaintiffs, in consideration of \$196, insured the defendants against loss or damage by fire, according to the terms endorsed upon it, for the term of one year, to the amount of \$2,800, being a re-insurance on property covered by defen-

dants' policy No. 434,292, issued at Montreal in favour of William Hamilton & Son of Toronto, for the sum of \$2,800, upon a certain building; and agreed to make good to the defendants all such immediate loss or damage, not exceeding in amount the sum insured, as should happen by fire between the 10th of March, 1876, and the 10th of March, 1877. The defendants' policy had been issued to Hamilton & Son on the 2nd of April, 1874, on the same property, for the same sum, at an annual premium of 8 per cent., being \$224, and was duly renewed up to 2nd April, 1877. On the 23rd November, 1875, the plaintiffs, through Mr. James Rollo, their Toronto agent, re-insured the defendants for \$2,800, up to the 10th March, 1876, and received a proportionate part of the premium at the rate of 8 per cent. per annum, being the rate which Hamilton & Son were paying the defendants. On the 10th March, 1876, Rollo delivered an interim receipt to Boustead and Scadding, the Toronto agents of the defendants, for a re-insurance up to 10th March, 1877, at the rate of 8 per cent. No money was then paid to Rollo, on the ground, as he stated, that Boustead and Scadding represented that Hamilton & Son were in financial difficulties, and were not able at the moment to pay the premium. Before this date Boustead had become either assignee in insolvency or trustee for the benefit of the creditors of Hamilton & Son. It was therefore his business, as representing that estate, to pay the defendants \$224, and his firm, as representing the defendants should have paid the plaintiffs the premium for insurance. Shortly before the 25th April, 1876, Boustead, for the estate, did pay to his firm for the defendants the sum of \$224, and on that day his firm, through Mr. Scadding, paid Mr. Rollo \$196 less a commission of 5 per cent., being at the rate of 7 per cent.

On the 14th of June, 1876, the plaintiffs' manager sent Rollo the following postal card :

"Please explain why you have reduced rate on policy 4327. We already have eight per cent. under policy 1580 and cannot take this at seven per cent."

To which Rollo replied on the 15th as follows :

“The rate was reduced from eight per cent. to seven per cent. by consent and agreement of all the companies interested at the time the risks were last renewed, eight per cent. being considered excessive ; seven per cent. the highest rate paid to any company now.”

On the 2nd May, 1876, Rollo issued another interim receipt in substitution for that of the 10th March, and in similar terms. He did not remit to the plaintiffs' head office as he should have done, or communicate the fact of payment having been received. It was the practice of the plaintiffs to send Rollo policies which he would countersign and issue, and on the 29th June, 1876, he countersigned a policy in favour of the defendants, re-insuring them for one year from the 10th March, 1876, in consideration of a premium of \$196. This policy did not seem to have been delivered to the defendants. The plaintiffs' manager urged Rollo to obtain payment of the premium, which he represented that he had not collected, and insisted either that the premium should be paid or the policy returned.

In his evidence the manager used this language ; “ I insisted on his either returning us the policy or the premium. If he returned us the policy, we would hold him responsible for the pro ratâ premium during the time the policy ran.” The evidence thus proceeded :—Q. What was the result of that? Ans. The policy was returned cancelled. Q. And along with that was sent this portion of the funds, and you were led to believe in point of fact that all that had been paid on account of that insurance was the sum of \$65? Ans. We were led to believe that Mr. Rollo himself paid the money in accordance with my instructions. *He represented that he had not collected the premium.*” Rollo did remit to the plaintiffs \$65 with his June account, and returned the policy, which was cancelled by the plaintiffs on 10th July, and they then supposed that they had no further concern with the risk until October, when they discovered that the premium had been paid to Rollo.

On this point the manager's evidence was as follows :

"The policy, Exhibit A, was issued on 28th October, 1876, but on 10th July, 1876, we considered we were off the risk. But we discovered afterwards that our agent had received the premium and that we were still under the risk. That we discovered in October, 1876, and then we issued policy No. 6501, bearing date 28th October, 1876. We were not aware from July to October, 1876, that we were on a risk."

By their bill the plaintiffs alleged that the defendants falsely and fraudulently represented that they were themselves only receiving a premium of 7 per cent. for their policy numbered 434,292: that although Hamilton & Son paid 8 per cent. upon previous occasions upon all insurances, they thought such rate exorbitant, and that by the general consent of all the different Insurance Companies, it had been agreed to reduce the rate of premium to 7 per cent., and that such rate was what Hamilton & Son had paid to them, the defendants, on their policies, including that in respect of which they desired a re-insurance, and to the other Insurance Companies in respect of risks upon the property of which such policy covered a portion.

The Vice-Chancellor held that it was established that the defendants made such a representation: that it was untrue: that the policy had been thereby obtained, and was consequently null and void. Upon that view of the position of the parties he ordered a return of the premium, with interest from 25th April, 1876, the date of the payment to Rollo.

The other facts are stated in the judgment of Moss, C.J.A.

The case was argued on the 4th of January, 1878. (a)

J. H. Boyd, Q. C., (*C. Moss* with him), for the appellant. The alleged misrepresentation of the appellants' agent, upon which the decree proceeded, was not proved. It rests wholly on the unsupported testimony of Rollo, whose evidence should not be credited, as he told a deliberate false-

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

hood in reference to the cancellation of the policy ; and the maxim, "*Falsus in uno falsus in omnibus*," applies to the rest of his statements. No weight should be attached to Rollo's letter of June 15, as it was not contemporaneous with the misrepresentation. Blight swears that he told Rollo in April that the Western had not reduced their rate, so that he must have known that the representation, if any, was untrue before the policy issued. The learned Judge gave full credit to Boustead's evidence, and upon this holding he came to an erroneous conclusion that the misrepresentation was proved. It is submitted, however, that even if such a misrepresentation were made, it is not sufficient to avoid the policy, as it was not shewn that the respondents were induced to take the risk by reason of it, or that a confidence was thereby induced, without which the respondents would not have taken the re-insurance. It was not relied upon by them in effecting the re-insurance, as it was shewn that they exercised their own judgment in the matter. Nor can the decree be sustained on the ground that the appellants were guilty of a breach of the condition to retain an insurance equal to the amount of the respondents' policy, as the Court had no jurisdiction to declare a policy void *ab initio* on that ground. But the evidence shews that the condition was not broken, as the meaning of the condition clearly is merely that the appellants would not re-insure that portion. They referred to *Sibbald v. Hill*, 2 Dow 87, 263, and *Valton v. National Fund Fire Insurance Co.*, 20 N. Y. 37.

Ferguson, Q. C., (with him *E. G. Patterson*), for the respondents. The learned Judge in the Court below, who had the advantage of seeing the witnesses, properly found that the misrepresentation was proved. The letter of June 15th fully corroborated Rollo's evidence as to the misrepresentation. No importance should be given to Blight's evidence, as he neither remembered the time nor the place where the conversation which he swears to occurred. There can be no question that the misrepresentation was most material to the risk, as the respondents were entitled

to rely on the judgment formed by the associated companies; but even if it be held that the misrepresentation was not material, yet inasmuch as it was false and fraudulent, and was material in the opinion of the respondents in respect of their inducement to undertake the risk, it rendered the policy void. The evidence establishes that they were induced to take the risk by the misrepresentation, and that they would not have undertaken it at the rate at which they did but for such misrepresentation. The case of *Trail v. Baring*, 10 Jur. N. S. 87, 377, shews that the respondents are entitled to have the policy cancelled for the breach of the condition to retain the stipulated amount of insurance. They referred to *Sibbald v. Hill*, 2 Dow 87, 263; *Valton v. National Fund Fire Ins. Co.*, 20 N. Y. 32; *New York Bowery Fire Ins. Co. v. The New York Fire Ins. Co.*, 17 Wend. 359; *Louisiana Mutual Fire Ins. Co. v. New Orleans Fire Ins. Co.*, 13 La. An. 246; *New Brunswick and Canada Railway and Land Co. v. Mugeridge*, 1 Dr. & Sm. 362, 382; *Bigsby v. Dickenson*, L. R. 4 Chy. Div. 24; *Re Glannibanta*, L. R. 1 P. D. 285; *Brown v. The Royal Ins. Co.*, 1 E. & E. 853; *Taylor's Equity Jurisprudence*, 453, 460.

March 4, 1878. (a) Moss, C.J.A.—After stating the facts as above.—It is only fair to the defendants' principal agent to observe that if such a representation were made, he was in no way responsible for it. On the contrary, he was under the impression that it was a principle of law that upon a re-insurance the same amount of premium should be paid as was received by the original underwriters. Acting on this view he instructed Boustead and Scadding, who were the defendants' Toronto agents, as early as 28th April, to pay the plaintiffs the difference, and renewed these instructions three or four times before the fire. The failure of the Toronto agents to obey this direction is not satisfactorily explained, but it is clear that it did not arise from any desire to improperly make a personal profit.

(a) Present—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

On 2nd November, 1876, they wrote to the principal agent that the plaintiffs were well aware of the rate paid. They used this language; "We did not pay the difference, but will do so, if it is necessary. We will have to send to head office now as the agency has changed hands. We will require the policy to have it changed accordingly."

On the 16th November, Boustead and Scadding, having been again urged by the principal agent to set the matter right, wrote to the plaintiffs' head office in the following terms: "We re-insured with your agent here (Mr. Rollo) some time ago, a risk on Hamilton & Son's car works, the rate being 7 per cent., the policy for which we have just received. We suppose that you are aware of the rate charged by associated companies is 8 per cent., which rate is paid to us, we having at the time the re-insurance was effected some \$7,800 on the property, the \$2,800 insured with you being the whole of our policy on that particular part. We presume that in case a loss should occur, there would be no possibility of trouble arising out of the fact of the difference in the rates charged by our respective companies." It is difficult to conceive why the agents should have preferred sending such a communication to obeying the explicit directions of their superior.

On the 20th November, before the plaintiffs had given any answer, the fire occurred.

The defendants contend that there was not sufficient proof of the alleged misrepresentation. In considering this branch of the appeal, it is necessary to make full allowance for the superior advantage enjoyed by the learned Judge who had the opportunity of hearing the *viva voce* testimony. But giving this salutary rule its widest scope I must, with great respect, express the opinion that the defendants' contention is well founded. The onus of establishing the alleged misrepresentation rested upon the plaintiffs. They were bound to submit proof so clear and satisfactory as to place its existence beyond the region of doubt or mere presumption. As has been well said, the Court in a doubtful matter leans against the conclusion of fraud. Now this

case rests wholly upon the testimony given by Mr. Rollo at the trial, and upon a letter he addressed to the plaintiffs' manager on the 15th of June. It will be proper to examine first his own statements of what occurred. He was asked: "How did it come that you accepted the seven per cent. instead of eight per cent., the rate mentioned in the first interim receipt?" To which he replied:

A.—I took the period elapsing between the issue of the first interim receipt on the 10th day of March and the issue of the second interim receipt, at the rate of seven per cent. I called at the office of the defendants quite a number of times to know when this risk would be completed, and on the occasion when this re-arrangement was made it was stated by the agent of defendants that the premium had, by general consent, been reduced to seven per cent., eight per cent. being considered exorbitant. I was unwilling to reduce the rate, because it conflicted immediately with my own interest. I received commission on the premium they paid, and I was anxious to know the reason of the reduction, and I was informed all the companies interested in the risk had agreed to reduce the rate to seven per cent.

He said Mr. Scadding was the first person to make that statement. Mr. Boustead was in his inner office when this conversation took place, and he came out while it was in progress, and corroborated the statements made by Mr. Scadding. He explained that he was remunerated by a per centage on the premium he received, and was therefore directly interested in securing the largest possible amount. His evidence then proceeded as follows:—For that very reason I enquired particularly why they wished me to accept seven per cent. instead of eight, and considered that it was particularly necessary that I should know that, having already accepted an interim receipt at the rate of eight per cent. and held it for a month, and I heard nothing in the meantime to give me to suppose that there was to be any change.

Q. Did they say that the Northern had accepted seven.

Ans. I used the words intentionally and deliberately, "all the companies concerned in the risk."

Q. What did they tell you the Northern company was getting.

Ans. I do not know that the Northern company or any company insuring on the risk was specifically mentioned.

Q. You accepted the seven per cent.

Ans. I stated to the defendants if that was the fact I would follow the lead of the other companies. An explanation was asked by the company why the reduction had been made, and my letter of explanation corroborated exactly what I say now.

To his Lordship—

Q. That you followed the lead of the other companies, and accepted the risk at the reduced rate.

Ans. Yes.

He denied that he was told that the Gore Insurance Company had reduced their rate from eight to seven per cent., and that he ever made enquiries on the subject from any person except Boustead and Scadding. He said the only reason given for the reduction was that Hamilton considered the rate exorbitant.

He repeated that Mr. Boustead corroborated what Mr. Scadding said, and that Mr. Boustead said the other companies *were all reducing* the rate from eight to seven. It is beyond doubt that Boustead, acting for the Hamilton estate, had, during the month of April, applied to the associated companies to reduce the rate; and it is quite conceivable that if there was any conversation relative to a reduction, it may not have gone beyond the length of a statement by Boustead of his expectation that the companies might assent to a reduction. No very great change in the language, which Mr. Rollo thinks was used, would be required to give this complexion to the statement. In the words, which he repeats, there are variations not without their importance. But both Scadding and Boustead emphatically deny that any such representation was made.

It is said that the learned Judge was not disposed to attach much weight to the accuracy of Scadding. But it

is conceded that he did not discredit Boustead. His reason for thinking that his denial did not counterbalance Rollo's assertion was, that it was argumentative in character, rather than positive. I confess that it does not give me that impression. On the contrary, it appears to me to be as unqualified as was possible. He expressly denies that he made the representation that all the companies had agreed to take seven per cent. instead of eight, or that he heard of Scadding making any such representation. According to his account he was not present at all when the arrangement was being made for the reduction of the rate.

It is true, that when cross-examined he expressed himself with caution, and adopted expressions which may critically be denominated argumentative, but it seems to me that his caution was no greater than might have been exercised by a truthful witness feeling an absolute certitude that he had never been a party to the alleged misrepresentation, and that the reasons he gave for his assertion were precisely what any man in his position might have been expected to suggest. Where a respectable and apparently truthful witness had denied, without qualification, that he had made the alleged misrepresentation, I am not prepared to treat this denial as neutralized by the following cross-examination:—"Q. Mr. Rollo swears there was an occasion in your office when Mr. Scadding was at the desk, that Mr. Scadding made the statement that he had reduced the premiums from eight to seven because the others had done it, that after that statement was made you came cut from the back office and re-affirmed it; you say that is not true? A. I do not remember any such conversation whatever. Q. But you cannot undertake to say that it ever did occur? A. I do not remember it ever occurring. Q. Will you go so far as to swear positively that it did not occur? A. I will swear positively that I could not have told him, because it would not have been true. Q. You know that when a man swears to a negative he can only say he does not remember that it occurred. Now, in that view of the matter I ask you, do you swear that what Mr.

Rollo says did not occur? A. I simply swear this, that from my knowledge I could not have said so, and did not. Q. Did you swear that you never heard Mr. Scadding make such a statement? A. I never heard Mr. Scadding make such a statement, because if I did I should have corrected him."

Moreover, Mr. Rollo's accuracy of recollection and of statement is seriously impeached. It will be remembered that Mr. Corey swore that policy, No. 4327, of the 29th of June was cancelled, because the premium had not been paid; but Mr. Rollo's statement is, that it was cancelled through error; that he had a policy to cancel, and instead of cancelling the proper policy cancelled that one. He declared that he was as sure of that as of everything else he told in the witness box. It is only necessary to recall the retention of the money by him, which led to the cancellation of the policy, to settle which version is to be accepted. Again Mr. Blight, an agent of the Western Assurance Co., whose veracity is wholly unquestioned, proved that shortly after the time that Boustead had applied to the associated companies for a reduction of rate, which was on the 5th of April, Rollo asked him if his company was taking the risk at anything less than eight per cent., to which he replied in the negative.

This not only contradicts Rollo's statement that he had never made any enquiries on the subject except from Boustead and Scadding, but tends to shew that he was well aware that an attempt was being made to obtain a reduction.

Upon the whole of this evidence, and making every allowance for the favourable impression that Mr. Rollo may have produced, I cannot think it would be consistent with principle to hold that the plaintiffs had established a fraudulent misrepresentation.

The opinion I have formed is that Mr. Rollo was exceedingly anxious to get the risk. He knew that the Gore District Company had agreed to accept seven per cent., and he was quite content to take that amount. If he had then

formed the idea of delaying its remittance to his principals, that would certainly not have diminished his readiness to accept even the lower rate. But if it were proved that the defendants' agent did untruly represent that all the companies had reduced the rate from eight per cent. to seven, I think that the policy would not be rendered void. The proposition advanced by the plaintiffs is, that such a representation was fatal to the validity of the policy, because it influenced their estimate of the amount of premium they became willing to accept. There are statements to be found in text books of repute which seem to lay down such a proposition in somewhat general terms, and the plaintiffs contend that these are amply supported by the decided cases to which they have referred.

Mr. Bunyan thus states his view of the law:—"The following may be taken as the example of a misrepresentation not rarely occurring, namely, when a person proposing an insurance states to the office intentionally that the same risk had been accepted by another office at a particular premium, and so induces the manager to accept it also at that rate. Such a policy would not be upheld." He cites as authorities *Sibbald v. Hill*, 2 Dow 263, and *Trail v. Baring*, 10 Jur. N. S. 87, 377, which I shall notice presently.

At page 527 of *Arnould* on Insurance, 5th ed., it is said: "Every representation is to be presumed material which there is just reason to believe either determined the underwriter to insure, or influenced his estimate of the premium.

The test of materiality is the probable effect which the statement might naturally and reasonably be expected to produce on the mind of the underwriter. It is not necessary that the representation should be directly as to the state or condition of the subject of the proposed insurance; it is enough that it reasonably did exert, or might reasonably be presumed to have exerted, an influence over the mind of the underwriter in determining to assume a responsibility he would not otherwise have undertaken."

Sibbald v. Hill, 2 Dow 263, is the authority given for this statement.

In *Phillips* on Insurance, 5th ed., p. 276, the rule is thus enunciated: "A misrepresentation is a false representation of a material fact by one of the parties to the other, tending directly to induce the other to enter into the contract, or to do so on terms less favourable to himself, when he otherwise might not do so, or might demand terms more favourable to himself. Though the fact misrepresented by the assured is on a matter concerning which he is not required to make any representation, still, if it tends directly to induce the underwriter to subscribe to the policy when he otherwise might not do so, or to induce him to underwrite at a lower premium than he otherwise might do, it is a misrepresentation."

Again *Sibbald v. Hill*, 2 Dow 263, seems to be the authority relied upon.

In the opinion of Mr. May, p. 207, the rule appears to be that "a misrepresentation, though not bearing upon the character of the risk, if such as to mislead the insurers into taking a risk which otherwise would not have been taken, is as fatal to the validity of the policy as if it had related to the nature of the risk." He refers by way of illustration to a case reported in 13 Louisiana Annual, which I have not seen, where one insurance company having applied to another for re-insurance on certain articles of personal property, and induced the re-insurers to believe that they had insurance on the buildings, which was not the fact, the policy was held to be void. This, he says, is not strictly a misrepresentation of facts upon which the value of the risk is determined, but rather a false pretence of a fact which induces the insurer to take the risk without enquiry as to its value.

In my humble judgment he thus gives a more precise and accurate exposition of the law as to the effect of statements respecting the *premium*, than is contained in the other extracts I have just read. As at present advised, I am not prepared to assent to the doctrine that an incorrect statement voluntarily made by the insured, which in no sense operates as an inducement to take the risk, or misleads the

underwriter as to its nature, character, or extent, or prevents him from making further enquiry, but simply tends to induce him to accept at a lower premium a risk with every incident of which he has made himself acquainted, necessarily avoids a policy. The authorities do not appear to me to warrant so general a proposition. So much stress has been laid upon the case of *Sibbald v. Hill*, 2 Dow 263, that it seems proper to examine it somewhat in detail. The subject matter of the insurance was two South Sea Whalers then absent on a voyage. The owner, who resided in London, represented to the appellants who were in business at Leith, that he had as much insurance as his underwriters at Lloyd's were willing to take, and that eight guineas per cent. was the highest premium he had given. After some delay, the appellants who were not themselves acquainted with the risk, in reliance upon the skill and information of the Lloyd's underwriters, underwrote the policy for a large sum at eight guineas per cent. In fact the premiums at Lloyd's on the ship had been 15, 18 and 25 guineas.

The Lord Ordinary and the Court of Session decided in favour of the insured on the ground that there was not such a misrepresentation as could affect the nature of the risk, although they did not say that it would not affect the premium. Lord Eldon said, at p. 266, that it appeared to him to be settled "That if a person meaning to effect an insurance exhibited a policy underwritten by a person of skill and judgment, knowing that this would weigh with the other party and disarm the ordinary prudence exercised in the common transactions of life, and it turned out that this person had not in fact underwritten the policy, or had done so upon such terms as that he came under no obligation to pay, * * this would vitiate the policy," and that the Courts would say that this was a fraud, not on the ground that the misrepresentation affected the nature of the risk, but because it induced a confidence without which the party would not have acted. Holding that the real meaning of the letter was that insurance had been effected in the same voyage at Lloyd's at eight guineas per cent., he de-

cided in favour of the underwriters. Now it will be observed that the underwriters had no opportunity of examining the risk, or of forming a judgment otherwise than by an estimate of probabilities dependent upon various circumstances. These circumstances were peculiarly within the knowledge of the people at Lloyd's. They were the persons who from their position and opportunities could best calculate the chance of the ship's safe return. Upon their skill and information the underwriters reasonably relied. They might well be willing to venture upon a risk which had been taken at Lloyd's at eight per cent., when they would have peremptorily declined it had they been told that premiums had been paid rising from fifteen to twenty-five per cent. I think that Lord Eldon's language unambiguously shews that this is the effect which the statement of the truth might have produced upon the minds of the underwriters. The special ground upon which he puts his judgment is, that a confidence was induced without which the policy would not have been given.

I do not think that any useful purpose would be served by discussing the judgments in the State Courts of the United States, to which we were referred. I have read them all, but none of them appear to be so apposite, or to proceed upon such a train of reasoning, as to assist in arriving at a conclusion.

They appear to me to have gone the length of holding that a fraudulent representation made by the assured upon his application, though not material to the risk, yet material in the judgment of insurer, and which induced him to take the risk, will avoid the policy. But this is the limit to which the doctrine has been pushed.

Now giving the plaintiffs the full benefit of the assumption that this proposition can be accepted without any qualification, it is not sufficient to support their case. Their agent had, upon his own judgment, and in the exercise of his own skill, accepted this risk in November, 1875. He was thoroughly well acquainted with the character of the property, the nature of the business there carried on, and

every circumstance which could influence him towards accepting or declining the risk. On the 10th March, 1876, he renews the risk for another year, in consideration of \$224, which is to be paid by the defendants. He applies for this money from time to time, and at last, on the 22nd April, according to his account, is told that the other companies had reduced, or were reducing to seven per cent., and is therefore asked to take \$196 instead of \$224, which he agrees to do. He had already accepted the risk. The premises had been under insurance with his company since the 10th of March. The term covered by the policy which the plaintiffs seek to cancel commences on the 10th of March. I fail to see how such a policy can be avoided by a statement made on the 25th April. The sole effect was to induce him then to accept \$196 instead of \$224. The fundamental doctrine of equity is, to use the language of Lord Cottenham, as cited with approval in *Hammersley v. De Biel*, 12 Cl. & F. 88, that "A representation made by one party for the purpose of influencing the conduct of the other party, and acted on by him, will, in general, be sufficient to entitle him to the assistance of this Court for the purpose of realizing such representation;" or as Lord Romilly expressed it in *Yeomans v. Williams*, L. R. 1 Eq. 186, "Where one man induces another to enter upon a certain course of action upon the faith of representations held out by him, he shall be compelled to make such representations good." As I have already shewn, there is no pretence here for asserting that Scadding's statement, if made, was for the purpose of inducing Rollo to take the risk, or that it did operate as an inducement to take the risk. Its sole object, as well as its sole effect, was, to lead him to take \$28 less than the defendants' agent had originally agreed to give. To that extent only could the plaintiffs, under the actual circumstances of this case, have been damnified by the misstatement. The question being, what did the representation induce the other party to do, or what change of position did it occasion? the answer is, to accept \$28 less than he might otherwise have been willing to do.

In most cases a representation affecting the amount of the premium will be of such a character as to operate upon the mind of the underwriter with respect to the nature or character of the risk. But where the circumstances shew that its sole effect was to diminish the rate of premium upon a risk which the underwriter had already determined and agreed to take, it seems to me to be contrary to reason and legal principle to hold that it avoided the policy.

The plaintiffs have also put forward as a ground of relief, that by special arrangement the following condition was endorsed upon the policy:

"This reinsurance is subject to the same specifications, terms, and conditions, as policy No. 434,292 of the Northern Assurance Company which it reinsures, it being well understood that the Northern Assurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto on other parts of Hamilton & Son's works."

And that the defendants permitted one of the policies which they had issued upon other portions of the works of Hamilton and Son to expire, and did not retain an insurance risk to an amount equal to that covered by the plaintiffs' policy.

It is too obvious to need comment that this complaint, if well-founded in fact, does not entitle the plaintiffs to a cancellation of the policy, as being void *ab initio*. If available at all it would only be by way of resistance to payment of the defendants' claim. But the defendants having prayed, as they were entitled to do, by way of cross relief for payment, it becomes necessary to consider the effect of this contention. The state of facts is shortly this: On the 10th of March, 1876, when the plaintiffs' risk commenced, the defendants had three policies on different portions of the Hamilton works. That which the plaintiffs assured was for \$2,800; the other two for \$2,500 each. One of the latter expired on the 1st of November, 1876. This the defendants were ready to renew, and sent the ordinary receipt to their Toronto agents for the purpose of renewal.

but neither Hamilton & Son, nor their assignee, desiring to continue this insurance, the receipt was returned, although not until after the fire had occurred. At that date the defendants' chief agents at Montreal did not know that this policy had dropped. The defendants paid the whole of the \$2,500 due upon their other policy for that amount, and the proportion of loss falling under the policy in question in this suit is \$2,200, which the defendants call upon the plaintiffs to pay.

I do not think that the defendants have been guilty of any breach of the condition. Its obvious purpose was to guard against the defendants further reinsuring to an extent which would lower their interest in the premises beneath that of the plaintiffs. They are to *retain* their insurance to an amount equal to that reinsured with the plaintiffs. They did retain it to the full amount. They did not reinsure, or otherwise get rid of their risk. The plaintiffs' proposition when formulated carries its own refutation. It is that the condition means that when the first of the two policies of \$2,500 expired, the plaintiffs were obliged to go on insuring the premises covered by it to the extent of \$300 without the request of the Hamilton estate, or that otherwise their claim under the contract of insurance would be forfeited. To my mind it is impossible to attribute such a significance to the clause. The injustice of such a contention is the more manifest, when it is observed that in the actual result the defendants are losers by the fire to the amount of \$2,500, while the claim against the plaintiffs is only \$2,200.

The case of *Trail v. Baring*, 10 Jur. N. S. 87, 377, which came before Sir John Stuart, and afterwards before the Lords Justices, does not aid the plaintiffs' contention. It did not turn upon any stipulation in the contract of insurance itself, but on the fact that the contract itself was obtained by an untrue representation. One company offered to another by way of reinsurance a part of a policy upon a life, stating that another portion would be retained. The offer was accepted without investigation into the life,

but before the reinsurance was completed, the first company had parted with all the remainder of the policy. It was held that the first company's declaration of intention formed an important inducement to accept the insurance without more enquiry or further investigation than was then made, and that there being an alteration of intention before the contract was completed, it became the imperative duty of the party who had made the representation to communicate this alteration. It was therefore a case in which a policy was avoided, not by reason of non-compliance with a stipulation, but on the ground that it had been obtained by what the Court deemed fraudulent conduct.

I think that the appeal should be allowed, with costs, and a decree made in the Court below for payment to the defendants of the amount due under the policy, with their costs of suit.

PATTERSON, J. A.—The plaintiffs ask to have one of their policies by which they reinsured the defendants for the amount of a policy of \$2,800, upon a property of William Hamilton & Son, declared null and void, on the ground that they were induced to accept the risk at seven per cent. by a fraudulent representation made by the defendants' agent, that the rate at which the defendants had insured the property was seven per cent. whereas in fact it was eight, and by the representation, which they also charge as fraudulent, that the other insurance companies holding risks upon the same property had reduced their rates from eight to seven per cent.

The general effect of the evidence offered is, that the Toronto agent of the plaintiffs took the reinsurance at seven per cent. in place of eight, upon some understanding that other companies were doing the same. It is not evidence upon which it would be proper to find actual and intentional fraud. Whatever was said by the agents of the defendants on the subject of the reduction of the rate seems to have referred to actual discussions amongst the

different companies respecting a reduction of the rate. There is evidence that one company had reduced the rate, and that the plaintiffs' agent had been expressly told by the inspector of another, before issuing the policy now in question, that his company had not reduced the rate, but adhered to the eight per cent. The evidence would have justified a finding that the plaintiffs had not been led to accept the risk by any deception or misrepresentation; but whatever view may be taken respecting the proof of the allegation that the defendants' agent represented to the plaintiffs' agent that as a fact the defendants and the other companies had reduced or had agreed to reduce the rate, and that for that reason the plaintiffs agreed to the reduction, no valid ground is established for setting aside the policy.

The facts in *Sibbald v. Hill*, 2 Dow 263, which has been relied on in the argument, were in one respect not unlike those alleged in this case, but the *ratio decidendi* distinguishes it as an authority. The Leith underwriters knew nothing of the vessel, which was at sea; but relied upon the judgment of the underwriters at Lloyd's who did know, or who were assumed to know, the character of the risk; and they only knew what the opinion at Lloyd's was by inference from the rate of premium which was represented as that charged at Lloyd's. Here the character of the risk was as well known to the plaintiffs as to any of the other companies. They had already decided to accept the risk, and in fact an *interim* receipt had been given, while the question of rate was in suspense.

It is not pretended that they were, or that under the circumstances they could have been influenced in accepting the risk by the alleged misrepresentation. The utmost effect suggested is, that they were induced to take seven per cent. in place of eight. Therefore, if the facts afford ground for any relief, it is merely the awarding of the one per cent. which they say they were induced to forego; and not the setting aside of the policy.

The plaintiffs rely also upon a clause in their policy which embraces two matters:

First. "This reinsurance is subject to the same specifications, terms, and conditions, as policy No. 434,282 of the Northern Assurance Company, which it reinsures." The difference of the rate of premium is said to constitute such a departure from the specifications, terms and conditions of the defendants' policy, which was at eight per cent., as by force of this clause to vitiate that of the plaintiffs. No authority has been produced for this proposition, or for including the rate of premium among the specifications, terms and conditions of the policy. The clause is evidently inserted for a very different purpose, namely, to place the plaintiffs in the same position with regard to Hamilton & Sons, as was occupied by the defendants, and to guard against such a contingency as the original policy becoming forfeited, while the reinsurance might still be payable. See *May on Insurance*, page 9.

Second. "It being well understood that the Northern Assurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least hereto on other parts of Hamilton & Son's works."

It happened that before the fire occurred a policy of the defendants expired, and was not renewed. So that at the time of the fire they had only risks over and above their re-insurances to the amount of \$2,500, an amount larger, as it happened, than that which the plaintiffs were called on to pay under their policy, but \$300 less than the full amount of the policy.

This could not, in any view of it, furnish ground for declaring the plaintiffs' policy void *ab initio*, and so cannot aid the plaintiffs in maintaining their bill. It becomes important only as an answer to the defendants' claim for payment.

In my opinion the defendants have not violated the condition. They did retain a sufficient amount, and the lapse of the policy was from no act or default of theirs.

The case of *Trail v. Baring*, 10 Jur. N. S. 87, 377, has been relied on as supporting the plaintiffs' contention. That

was the case of a re-insurance on a life. The representation was that a £1000 risk was to be retained ; and upon that the re-insuring company did not examine the life, and effected the policy. In fact, before the policy was effected, the first company had abandoned the intention to retain any insurance, and had re-insured the £1000 amount which was represented as being retained. Sir G. J. Turner, expressly put his judgment on the ground that the case did not turn on any implied contract, but on the misrepresentation. The principle of the decision is very much the same as in *Sibbald v. Hill*, 2 Dow 263. In each case a judgment was formed of the propriety of taking the risk, not from examination or knowledge of the subject of insurance, but in reliance upon the opinions of others gathered or inferred from their conduct ; and the misrepresentation of the conduct, not the breach of any contract, was the ground for avoiding the policy. *Trail v. Baring*, therefore, is no authority for the contention that an agreement to retain a certain amount of the existing insurance imports a guarantee against the insured letting his policy drop. To my apprehension the plain meaning of the agreement is, that the defendants having a certain amount on the property, the plaintiffs agree to re-insure a part of it on the understanding that the defendants are not to re-insure the whole, but to retain—that is to forbear to re-insure—the stipulated proportion. The question raised has become possible by reason of the unusual character of the transaction.

In ordinary cases, that is to say where the re-insurance is part of the original risk, the amount retained cannot drop without the reinsurance dropping too. The first part of the clause in question is framed with a view to such cases.

The amount to be *retained* in this case being shewn upon the face of the stipulation to be a separate risk, though involved in the same peril as the other, the word has acquired a peculiar importance. In construing it we have to be guided by the rule applicable to all written documents, viz., to give to words their plain and gram-

mathematical meaning unless controlled by the context or the evident intention. The motive for the requirement is said to be, that the defendants should indicate their confidence in the adventure; a motive, the force of which is not very readily apprehended in the circumstances of this case, and which does not rest on the footing of those cases in which, to secure carefulness and good faith on the part of the owners or occupants of buildings, Insurance Companies sometimes require them to be their own insurers to a substantial amount, but still the only one suggested.

This condition was fairly fulfilled by the defendants, for they did retain more than was stipulated for. If the reduction of the amount, by the lapse of a policy without fault of theirs, left their liability a trifle less than the \$2,800, though fully equal to what the plaintiffs are asked to pay, the plaintiffs can only make the clause available as a defence against the claim for payment by showing that "retain" must be read as meaning "guarantee the continuance of," and not merely "forbear to reinsure." We should have to separate the word from the context, as well as to leave the motive out of view, if we acceded to the contention.

The meaning I attach to the word is at once natural and grammatical, and in harmony with the subject of the negotiation, which was re-insurance, and the tenor of the stipulations, which pointed to the amount to be re-insured and the amount that was not to be re-insured, or, in other words, to be *retained*.

I agree that the appeal should be allowed, with costs, and a decree made for payment to the defendants, with costs of the suit.

BURTON and MORRISON, JJ.A., concurred.

Appeal allowed.

SHANNON V. GORE DISTRICT MUTUAL FIRE INSURANCE
COMPANY.

Insurance—Double insurance—Notice to agent—Estoppel.

A policy of insurance on a "Grist Mill" covers not only the building, but also the fixed and movable machinery in it.

The plaintiff effected an insurance in the defendants' company on a grist mill. He stated in his application that there were no other insurances on the property, although there was an existing insurance on the fixed and movable machinery in the mill.

Held, that the policy was void, as there was a double insurance on part of the property insured by the defendants, and that they were not estopped from setting up such further insurance by their agent's knowledge of it.

Per Moss, C.J.A. The true test of the plaintiff's right to recover was, whether he could have obtained a reformation of defendants' policy by confining it to the building alone; and this he could not have done for the evidence shewed that it would then have been for an excessive amount, and a risk which defendants would not have accepted.

THIS was an appeal from a judgment of the Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the defendants, and enter a verdict for the plaintiff, reported 40 U. C. R. 188. The pleadings and facts are sufficiently stated there, and in the judgments on this appeal.

This case was argued on the 21st January, 1878. (*a*)

Bethune, Q.C., (with him *C.A. Durand*), for the appellants. The fact that another insurance subsisted on part of the premises covered by the policy sued on cannot now be disputed, as it was conceded at the trial. The cases, however, conclusively shew that the term "Grist mill" would include the fixed and movable machinery in it; and that a double insurance on part of the insured property vitiates the whole. It is immaterial whether the insurance in the Hastings Company was effected before or after the insurance with the appellants, for if it was effected prior thereto, then there was a misrepresentation in the application; if on the other hand it was subsequent to that in question, it comes within the terms of the policy, and makes the contract void. The respondent knew that the notice of the

(*a*) *Present*—MOSS, C. J. A., BURTON, J. A., GALT, J., and BLAKE, V. C.

insurance in the Hastings should be given to the appellants, and that they would accept or reject the risk on the statements contained in the application, but he supposed that Morris would give the necessary notice. The learned Judge found that the application was filled up by Morrow, as agent for the plaintiff, but even if it had been filled up by Morris, the company would not be affected with such notice, as one of the conditions provides that if an agent fills up an application, he shall be deemed the agent of the insured and not of the company. Then the case of *Billington v. The Provincial Insurance Co. (a)*, in which judgment was recently given by this Court, decides that although notice to the agent is sufficient during the pendency of the interim receipt, it does not bind the company after the thirty days have expired. The statute expressly provides that the notice must be given to the Directors, so that the burden was on the respondent to shew that the agent was authorized to receive the notice, which he failed to do. Nearly all the authorities relied on by the Chief Justice of the Queen's Bench, are cases in which the agent had the right to fill up and deliver policies. The case of *Van Boires v. The United Life, Fire and Marine Ins. Co.*, 8 Bush. 133, is distinguishable from this case, as the agent there was a general agent for both companies, having the largest powers to bind them. No mutual mistake has been shewn such as to warrant a rectification of the policy. They cited *Ramsay Cloth Co. v. Johnstown Mutual Fire Ins. Co.*, 11 U. C. R. 517; *Billington v. Canadian Mutual Ins. Co.*, 39 U. C. R. 433; *Crawford v. The Western Assurance Co.*, 23 C. P. 365; *McCrae v. Waterloo County Mutual Fire Ins. Co.*, 1 App. R. 218; *Mitchell v. Lycoming Mutual Ins. Co.*, 51 Penn. 402; *Vose v. Eagle Life and Health Ins. Co.*, 6 Cush. 42; *Forbes v. The Agawan Mutual Fire Ins. Co.*, 9 Cush. 470; *Hendrickson v. The Queen Ins. Co.* 30 U. C. R. 108, 31 U. C. R. 547.

Strathy, for the respondent. We are not concluded as

(a) Since reported in 2 App. R. 158.

to there being a double insurance by the admission at the trial. The application shews that the intention was to insure the building alone. In reply to the question, "present cash value exclusive of land? the answer is, "building *only* \$6,000." Then there were no amounts filled in opposite to the items of the machinery, as the custom invariably is where machinery is insured. If there was a double insurance, the insurance in the Hastings Company was in existence prior to, or contemporaneously with, the making of the contract with the appellants; it was not, therefore, another insurance within the meaning of the condition pleaded. The respondent did not understand that there was any necessity to notify the appellants, but he thought that, if necessary, Morris would do so. Morris clearly had notice, and if the appellants had not actual notice, they had imputed knowledge thereof, and are estopped from setting up its non-communication by their agent. The language in the application was written in error and mistake common to both parties, who thought that they were thereby effecting an insurance on the building alone, and the policy should be reformed in accordance with the real contract. It is well settled that parties are not bound by the contract as it is expressed in writing, where it can be shewn what the contract really was.

The respondent had reason to suppose that a policy in terms of the contract would issue, and there was nothing in the policy to notify him that it was so. The maxim *Ignorantia legis non excusat*, does not apply where any doubt exists as to the meaning of the terms employed. The policy not being in conformity with the true contract between the parties, has not superseded the contract made by the interim receipt, which is therefore still enforceable. In *Hendrickson v. The Queen Ins. Co.*, 30 U. C. R. 108, the agent to whom the notice was given was *functus officio*, but in this case the whole difficulty has arisen from the fact that the agent was ignorant of his duty, and did not know that an insurance on the grist mill would cover the machinery. He cited *Macdonald v. Longbottom*, 1 E. & E. 977; *Hopkins*

v. *Provincial Ins. Co.*, 18 C. P. 74, 85; *Beauchamp v. Winn*, L. R. 6 E. & I. App. 223; *McEwan v. The Montgomery County Mutual Ins. Co.*, 5 Hill 101, 106; *Billington v. The Provincial Ins. Co.*, 24 Gr. 299; *Espin v. Pemberton*, 3 DeG. & J. 554; *Davis v. Scottish Provincial Ins. Co.*, 16 C. P. 185; *Williams v. Canada Farmers Mutual Ins. Co.*, 27 C. P. 119; *Redford v. Mutual Ins. Co. of Clinton*, 38 U. C. R. 538; *Dresser v. Norwood*, 10 Jur. N. S. 851; *Sheldon v. Cox*, Amb. 624; *Spaight v. Cowne*, 1 H. & M. 359; *Montreal Assurance Co. v. McGillvray*, 13 Moo. P. C. 87, 121, 124; *Henry v. Agricultural Mutual Assurance Association*, 11 Gr. 129; *Warner v. Peoria Marine and Fire Ins. Co.*, 14 Wis. 345; *McDonnell v. Beacon Fire and Life Ins. Co.*, 7 C. P. 308; *Wyld v. Liverpool and London Life Ins. Co.*, 23 Gr. 442; *Kelly v. The Isolated Risk Fire Ins. Co.*, 26 C. P. 299.

March 4, 1878. (a) MOSS, C. J. A.—The question is, whether the plaintiff can recover upon a policy issued by the defendants, a mutual fire insurance company, notwithstanding the existence of a policy issued by another company, and forming, as the defendants contend, a double insurance subsisting without the consent of the defendants' directors, signified by endorsement on the policy or otherwise acknowledged by the defendants in writing.

In the learned Judge's report of the trial, it is noted that the fact of double insurance is not disputed, and the effort of the plaintiff was directed towards avoiding its consequence on the grounds raised by an equitable replication. At the argument before us the learned counsel for the plaintiff, however, contended that there was in fact no double insurance. This argument has not led me to think that if the contention be still open, there is the slightest ground for hesitating as to the correctness of the opinion entertained by the learned Judge who tried the case, and all the Judges of the Court of Queen's Bench. The defen-

(a) *Present*—MOSS, C. J. A., BURTON, J. A., GALT, J. A., and BLAKE, V. C.

dants' policy insures the plaintiff's frame grist mill with stone basement. The insurance with the Hastings Mutual Company is upon "fixed machinery" in the frame grist mill. The cases referred to by Mr. Justice Wilson amply demonstrate that there was thus created a double insurance upon part of the property covered by the defendants' policy. I can add nothing on this subject to what has been said by that learned Judge.

But the majority of the Court of Queen's Bench (Mr. Justice Wilson dissenting,) were of opinion that in consequence of the same person being the agent of the defendants and of the Hastings Mutual, and looking at what took place between that person and the plaintiff at the time the insurances were effected, the defendants ought not to be allowed to set up that the additional insurance was not with their consent in writing so as to defeat the claim of the plaintiff. Mr. Justice Wilson thought that if the plaintiff had a case, it was for the reformation of the policy, and that under the circumstances he could not obtain that relief.

The latter appears to me to be the true legal ground upon which to put the plaintiff's claim. In the recent case of *Billington v. The Provincial Insurance Co.*, 2 App.R. 158, I pointed out, with some degree of detail, my reasons for thinking that in such cases as the present this is the true question presented for solution. An actual reformation is not necessary, but if a Court of Equity could not, without disregard of its well-defined and established principles, decree a rectification, the plaintiff is without remedy. It is much easier to say, in the general terms used in some of the decisions in the United States upon which the plaintiff relies, that insurance companies ought not to be allowed to set up such a defence, than to define with precision the legal principles upon which this kind of estoppel is founded. The vagueness of the formula may enable a Court occasionally to gratify the feeling of doing what it conceives to be actual justice; but it must, I think, be conceded that this advantage would be dearly purchased at the price of intro-

ducing additional uncertainty into the practical administration of law. The present case may well serve as an illustration. The majority in the Court below thought that in furtherance of justice the defendants should be precluded from objecting to the plaintiff's recovery. In this Court we are not convinced that the principles of justice entitle the plaintiff to any special consideration. It is contended on his behalf that there is no double insurance because that effected with the defendants may be treated as covering the building only, exclusive of machinery. The inequitable character of that contention is obvious. No one reading the evidence can hesitate to say that \$2,000 would be an extreme value to place upon the building alone, exclusive of machinery. Yet the plaintiff in his application represented it to be of the cash value of \$6,000. However, I have no doubt that in that valuation, whatever may be now contended, the 'plaintiff' did include the machinery. But even in that view it was a gross exaggeration. Less than a year before he had bought the whole property for \$6,200, and he has himself named \$3,000 as the value of the land and other buildings. I confess that the plaintiff's own statement in this respect relieves me from the slightest temptation to strain any point in his favour.

I entirely agree with Mr. Justice Wilson that the true question is, whether the plaintiff is entitled to a reformation of the policy, and that it should be answered in the negative. The decision of this Court, in *Billington v. Provincial Ins. Co.*, 2 App. R. 158, seems to me to be conclusive on the point. Here, as in that case, there never was a contract to insure the plaintiff for \$3,000, notwithstanding the insurance in the Hastings Mutual Co. The plaintiff knew perfectly well that the application he signed was to be transmitted to the head office for the purpose of furnishing the information upon which the defendants were to decide upon the acceptance or refusal of the risk. The learned Judge who tried the case has found, that although the plaintiff knew that the fact of the insurance with the

Hastings Mutual Co. ought to be communicated to the defendants, his attention was not directed to the necessity for the statement of it in the application, or to the omission of it from the application ; and that he relied on Morris, the company's local agent, giving whatever notice of it was necessary.

This finding should be accepted in its entirety. It seems to be fully sustained by the evidence, and is moreover a question upon which the Judge, who saw the witnesses, had superior opportunities of forming a correct opinion.

But the learned Judge has also found that the applications were written by a person named Morrow at the request of Morris, with the concurrence of the plaintiff, and that Morrow wrote them on behalf of the plaintiff, and not as the act of Morris. It is not found, nor is there any suggestion, that Morris undertook to give the defendants notice of the other insurance. It happened that Morris was local agent of the Hastings Mutual Co., as well as of the defendants, and granted interim receipts on behalf of both companies. It is not disputed that the learned Judge was correct in finding that the defendants had no knowledge of the other insurance, except so far as the knowledge of Morris can be imputed to them. In *Billington's* case, we were of opinion that the positive undertaking of the local agent to insert the proper notice in the application did not render the company liable. In this case, as I have pointed out, that element in the plaintiff's favour is wanting. There was not in this, any more than in *Billington's* case, a definite and concluded contract between the plaintiff and defendants, to which the Court can now make the policy conformable. The reasoning by which Mr. Justice Wilson shews that there could be no rectification to the effect that by the term grist mill, the plaintiff meant the building without the machinery, is, to my mind, unanswerable. On the ground which he mentions, namely, that the parties were not of one mind, any rectification is impossible. The defendants granted the policy in precisely the terms which they intended, and in conformity with the

application, which was the sole proposal they had to consider. I think that no attempt can be successfully made to distinguish this case in the plaintiff's favour from *Bilington's* case, and that the appeal must be allowed, with costs, and the rule *nisi* in the Court below discharged.

GALT, J.—I think the appeal in this case should be allowed. There is no doubt that the term "Mill," includes the machinery, and therefore the defendants were justified in so considering it. If the intention was to insure the building only, there was a gross over-valuation. In the application in answer to the question, "present cash value exclusive of land?" the answer is, "building only \$6000," In the plaintiff's own evidence, p. 12, he admits that in July, 1873, he purchased the whole property for \$6,200, and values the land and other buildings at \$3000, which would reduce the value of the building and machinery to \$3,200. It is not to be supposed that any Insurance Company would have accepted a risk of \$3000 on the building only, if a true statement of the facts had been made to them. Admitting the agent of the defendants knew there was a further insurance of \$2000 on the machinery, and admitting also that the intention was to confine the present risk to the building only, the defendants had a right to say: The representation of value made by you, if confined to the building only, is so erroneous that we never would have accepted the risk if we had known the risk, consequently you must, so far as we are concerned, be held to have intended what we thought you did, namely, to insure the machinery as well as the building, when you applied for insurance on a "Grist Mill."

BLAKE, V. C.—The agent had power to grant an interim receipt, and he gave this and bound the company thereby, as he had notice of the other insurance which existed when the application was made. This receipt contained the clause, "It is hereby mutually agreed that unless this receipt be followed by a policy within the said thirty days

from this date, the contract of insurance shall wholly cease and determine, and all liability on the part of the company shall be at an end." Within the thirty days nothing was done, and the liability of the company ended. After the expiration of the above period, and after the fire, a policy was sent to the plaintiff. This is the only contract between the plaintiff and the defendants. It issued on the application of the plaintiff, which failed to disclose the other insurance. On this contract as it stands, the plaintiff cannot recover. It is evident there was an over-insurance; that the company would not have accepted the risk under the circumstances; and that if what has been presented to the Court had been made known to the company, the risk would have been declined. The plaintiff is thus asking the Court to modify the agreement between the parties in favour of the plaintiff, so as to bind the defendants to a bargain which they did not make, and into which, it is clear, they would not have entered. This the Court cannot do. The appeal must be allowed, with costs.

BURTON, J. A., concurred.

Appeal allowed.

SMITH V. HUTCHINSON.

Insolvent Act of 1875—Payment—Fraudulent preference—Sections 133 and 134.

Held, that a payment by an insolvent in the ordinary course of business within thirty days before an assignment or the issue of a writ of attachment, is not void under section 134 of the Insolvent Act of 1875, unless the payee knows of the insolvent's inability to meet his engagements in full, or has probable cause for believing the same to exist.

Held, also, that a money payment not avoided under that section cannot be avoided under sec. 133 by shewing that it was made in contemplation of insolvency, and that it gave the debtor an unjust preference, as a payment in money does not come within that section.

Ex parte Simpson, 1 DeG. 9, distinguished.

The plaintiff, as assignee in insolvency of one Dicken, against whom a writ of attachment was issued on the 6th of April, 1876, sought to recover from the defendant a sum of \$70, paid to him by the insolvent on the 28th of February previous, and a sum of \$94.61 paid on the 13th of March previous to the Merchants' Bank, to retire a bill of exchange at three days sight, drawn by the defendant upon and accepted by the insolvent on the 7th of March.

The cause was tried at Toronto, before McKenzie, County Judge, without a jury.

The only evidence offered by the plaintiff was that of the insolvent, which can be briefly summarized. He began to take stock about the 22nd of February, and completed it within a few days, probably on the 25th. The result was to lead him to the conclusion that his liabilities exceeded his assets, and that he could not continue his business unless he succeeded in effecting some compromise with his creditors. Still he determined to carry it on as usual until he was prepared to make some proposition. On the 28th of February he proceeded to Toronto from Brampton, where he lived, with the intention of seeing some of his creditors. Whether he disclosed the state of his affairs to any of them did not appear. He had been dealing with the plaintiff, and was indebted to him, although to what extent, or to what amount was not shewn. On that day he called upon the defendant, whose place of business

was in Toronto, gave him an order for some goods, and paid him the sum of \$70. What proportion this bore to the existing debt did not appear. For all that was said it might have been the whole amount or only a small part. The conclusion to be drawn from the evidence was that he had just previously telegraphed to the defendant to send him a further supply of goods. On the 2nd of March he wrote ordering one barrel of rye whiskey, and one barrel of malt whiskey, to be shipped by the next train. Again on the 15th of March he ordered another barrel of rye whiskey, and renewed the order for the barrel of malt which had not been forwarded. He distinctly swore upon the trial that he did not inform the defendant of the position of his affairs until afterwards.

The learned Judge nonsuited the plaintiff, on the ground that there was no evidence that the defendant knew of the insolvent's inability to meet his engagements or that he had probable cause for believing it; and that the insolvent did not intend the payments to be preferential; and a rule *nisi* to set aside this ruling was subsequently discharged.

The case was argued on the 6th January, 1878 (a).

W.A. Foster, for the appellant. The insolvency was clearly proved, and under section 134 of the Insolvent Act 1875, all payments made within thirty days prior to an assignment or issue of a writ of attachment, where the trader is at the time in insolvent circumstances, are void, even although the creditor is ignorant of his debtor's inability to meet his engagements in full. Then section 133 also applies to avoid the payments, as the payment of this creditor was an unjust preference, and the case of *Ex parte Simpson*, 1 DeG. 9, shews that money payments are covered by the words "goods and effects." It was held in *Ex parte Matthews*, 25 L.T.N.S. 226, that a payment by a debtor in embarrassed circumstances in the ordinary course of business, without any fraudulent intent, was not an unjust

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preference ; but, as pointed out in *Davidson v. Ross*, 24 Gr. 22, the intent is immaterial under our Act. He referred to *Lamb v. Allan*, 37 U. C. R. 143.

Rose, for the respondent. Before a payment can be avoided under section 134 it must be shewn, in addition to the other requisites of the statute, that the creditor knew that his debtor was in insolvent circumstances, but no such knowledge on the part of the respondent was proved here. The construction attempted to be put upon section 133 is wholly untenable, and against the interests of public policy. The word "payment" is used in different senses in the two sections. In section 133 the Legislature was dealing with the case of a transfer of goods, which stands on an entirely different footing from a payment in money, which was expressly provided for in section 134. Moreover it is enacted in the latter part of section 133 that the "subject thereof" may be recovered for the benefit of the estate, which expression is clearly not applicable to a money payment. Besides, the evidence does not shew an unjust preference or that it was made in contemplation of insolvency. He cited *Risk v. Sleeman*, 21 Gr. 250.

March 4, 1878 (a). Moss, C. J. A.—I think that the decision complained of was perfectly correct. Neither of the payments seems to me to be obnoxious either to the letter or to the spirit of the insolvency law.

The learned Judge found that there was no evidence that the defendant knew or had probable cause for believing that Dicken, at the time he made the payments in question, was unable to meet his engagements in full ; and this is the only conclusion that could be drawn from Dicken's testimony. As the learned Judge remarks, it is not very likely that the defendant would continue to furnish goods to him, after he had discovered his insolvent condition.

The first payment was made more than thirty days

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before the proceedings in insolvency were initiated, and therefore was by this circumstance alone excluded from the operation of the 134th section of the Insolvent Act of 1875. The second payment was within the thirty days, but it is just as clearly outside the scope of the section. In order to render a payment void within that section it must not only be made by a debtor unable to meet his engagements in full, but it must be made to a person knowing such inability, or having probable cause to believe the same to exist. It is not sufficient that the payer is actually insolvent and fully aware of his condition, unless the payee has knowledge, actual or constructive, of his inability to meet his engagements in full. In this case the first ingredient is found, but the second is wanting. The established facts have forced the plaintiff to contend that every payment made within thirty days before an assignment or attachment is void, if there was at the time actual insolvency, and that payments made in the ordinary course of business form no exception, even if the payee was wholly ignorant of or had no reason to suspect his debtor's insolvent state. The language of section 134 certainly does not require us to accede to that view. Nor do considerations of public policy demand so harsh a construction of the enactment. In England it has been expressly held that general convenience is in favour of supporting the validity of payments made in the ordinary course of business, and received *bond fide*. Sir James Bacon, *In re Cheesebrough*, L. R. 12 Eq. 363, declared that to hold otherwise would be to embarrass and impede the most ordinary every day transactions of commerce, and to make it impossible for creditors to know when the payments received by them in good faith, and in common course, could be maintained. The 92nd section of the English Bankruptcy Act, 1869, provides that every payment made by any person unable to pay his debts as they become due from his own moneys, in favour of any creditor, with a view of giving such creditor a preference over the other creditors, within three months of the person so paying becoming

bankrupt, shall be deemed fraudulent and void. Nevertheless it was held that unless it could be made clearly apparent that the debtor's sole motive was to prefer the one creditor to the other creditors, the payment could not be impeached.

Special stress was laid upon the inconveniences which would arise in the commercial world, and even beyond its pale, if persons receiving payment of their just demands received such payment at the risk of having to refund it in consequence of the improper motive actuating their debtor, but of which motive they had no cognizance, and in which they had in no degree participated. This language seems to have received the approval of the Lord Justices in *Ex parte Butcher*, L. R. 9 Ch. 595.

I have not referred to these cases as authorities upon the construction of our statute, the language of which is very different; but in support of the proposition, obvious enough in itself, that public policy and general convenience are opposed to the plaintiff's contention. It is quite correct to say, that under our law, when there is a concurrence of payment within the thirty days, inability of the debtor to meet his engagements, and knowledge by the creditor of this inability or probable cause for believing in its existence, the payment cannot be sustained, even if the debtor does not intend to give a preference. But it is essential that these elements should all exist. While the decision of the Judicial Committee of the Privy Council in *Nunes v. Carter*, L. R. 1 P. C. 342, shews that the payment is void if made within the prescribed period although there was no intention to give a fraudulent preference, it certainly is no authority for the proposition that it can be impeached in the absence of any of the incidents expressly laid down in the statute.

But the argument most strongly pressed upon us was, that even if this transaction has eluded the grasp of the provision I have just been discussing, it falls within the 133rd section. The point made was, that the section enacts that if any property, real or personal, movable or immovable,

goods, effects, or valuable security be given by way of payment by a person in contemplation of insolvency to any creditor, whereby such creditor obtains, or will obtain, an unjust preference over the other creditors, such payment shall be void; and that money is included in the term "goods and effects."

It was urged that the effect of this was, to require the plaintiff only to shew that Dicken contemplated insolvency, and that the result of the transactions was to give the defendant an unjust preference. If the section does extend to such payments as those in question, it would undoubtedly follow that the plaintiff was not bound to establish, more than those two propositions. For my own part, I do not think that it can be said that the defendant did obtain an unjust preference; but the broader question is, whether a payment of money in the ordinary course of business to an innocent creditor is touched by this particular section. The first observation that naturally suggests itself is, that if it be, why should the Legislature have made such careful provision for the case of payments made within the thirty days. No limit of time is prescribed with regard to transactions prohibited by this section, and it would be attributing to them something like absurdity to suppose that they intended payments made more than thirty days before the insolvency to be more easily avoided than those made within that period. That was a difficulty with which the learned counsel for the plaintiff manifestly found himself unable to grapple on principle, but he sought to shelter himself under the authority of *Ex parte Simpson*, 1 DeG. 9. An examination of that case shews that it does not lend any real support to his contention.

The question was, whether a payment of money by way of fraudulent preference came within the meaning of the words, "gift, delivery, or transfer of any of his goods or chattels," as used in the statute, 6 Geo. IV. c. 16, sec. 3. Sir J. L. Knight Bruce held that a payment of money was covered by those words. In arriving at this conclusion, he applied, as I read his judgment, the ordinary rules for the

construction of such a statute. It could not be doubted that money was among the things, which the word "goods" might, with correctness and propriety, be used and understood as describing or signifying.

There the question was, whether it was used under circumstances, or accompanied by a context, rendering it necessary or proper to interpret the words as exclusive of money. There could be no such circumstances, he thought, because money was as much within the mischief against which the statute was intended to guard, within the wrong which it was intended to remedy, as any other goods or chattels. Expressing himself with his usual picturesqueness and force, he said that he would, by any other construction, be compelled to say that by the law of England, a trader holding in his right hand cash, and in his left bills of exchange, having but a day to run, accepted and generally endorsed by the first mercantile houses in London, was capable of committing an act of bankruptcy by delivering what he had in one hand, while incapable of committing an act of bankruptcy by delivering what he held in the other. Then as to the question of context, he thought, upon a full consideration of the provisions of the statute, through which it is needless to follow him, that there was nothing to limit the construction of the words, "goods or chattels," so as to prevent money from being comprised under them.

There is no real analogy between that case and the one we are now considering; and while I entertain no doubt of the correctness of the decision of that eminent Judge, I am quite certain that upon the very principles he has enunciated, he would have held that section 133 was not pointed at a payment of money.

The special provision made in the succeeding part of the section would have supplied the controlling context he could not find in the Statute he was interpreting. If anything were wanted to fortify this position, it would be found in the language on which Mr. Rose very properly founded an argument, namely, that the remedy furnished is that

“the subject thereof may be recovered for the benefit of the estate by the assignee—language which with no propriety can be employed in relation to a money payment. It is not difficult to suggest a reason for the Legislature making a distinction between an actual payment in money, and the giving of any property, real or personal, movable or immovable, goods, effects, or valuable security. The former is something falling within the scope of an ordinary business transaction, and therefore not to be disturbed, if the creditor were entirely innocent.

The latter is exceptional, and in itself more or less calculated to excite suspicion that the creditor doubted the solvency of his debtor.

The consequences of yielding to the plaintiff's contention would be so serious to the conduct of mercantile business, that it is satisfactory to feel assured that neither precedent nor principle requires us to lend it the slightest countenance.

The appeal must be dismissed.

BURTON, J. A.—The substantial question raised upon this appeal is, whether a payment by an insolvent to a creditor not knowing of his inability to meet his engagements in full, nor having probable cause for believing the same to exist, though not void under the 134th section, is liable to be impeached as an unjust preference under the 133rd section.

The learned Judge in the Court below nonsuited the plaintiff, holding that there was no evidence to shew a knowledge, on the part of the defendant, of the insolvent's inability to meet his engagements, under the counts framed upon section 134; and that upon the other counts, which sought to impeach the transaction as an unjust preference under section 133, the case was not made out, basing his judgment however upon the fact that there was no intention on the part of the debtor to prefer.

There can be no doubt that the payments in question could not be impeached under the 134th section, and the

only point attempted seriously to be supported before us was, whether such payments could be held to come within the 133rd section as "goods, effects, or valuable security," given by way of payment by the insolvent in contemplation of insolvency, whereby the defendant obtained an unjust "preference;" and we were referred to a case in which the words "goods and effects" under one of the English Bankrupt Acts were held to include money. But the question is, what interpretation is to be put on these words in our own statute, found as they are in juxtaposition with words having reference to a sale, deposit, pledge, or transfer of property, real or personal, by way of security for payment, and to the gift of any such property by way of payment—terms which would seem to apply to property of a tangible or visible nature other than money, especially when we find the subject of money payments treated of in the section immediately succeeding that in which these words occur.

In considering the decisions under the English Bankrupt Acts, it is necessary to bear in mind that the right of the assignee to the bankrupt's property dates *primâ facie* from the act of bankruptcy, and that to prevent the obvious injustice which would result to persons dealing innocently with the bankrupt without any knowledge of his insolvent condition, exceptions have from time to time been engrafted, confirming all contracts, dealings, and transactions *bonâ fide* entered into before the date of the fiat without notice of a previous act of bankruptcy.

The framers of our insolvent laws have endeavoured to avoid the injustice which but too frequently occurred under the earlier English Acts by providing that the effect of an assignment, or the issue of a writ of attachment, shall be to vest in the assignee all the property to which the insolvent is entitled *at the date of such assignment or the issue of such writ*, or which he may become subsequently entitled to up to the time of his obtaining his discharge, declaring at the same time that certain specified contracts, conveyances and transactions shall be void or voidable as against the assignee.

These impeachable transactions are defined in what are usually known as the the "Fraud and Fraudulent Preference Clauses," numbered from 130 to 137.

All contracts, conveyances, and transactions of the insolvent up to the very day of the issue of the writ of attachment, are valid, unless they come within one or other of these sections, and are in consequence liable to be impeached either on the ground of fraud or fraudulent preference.

It is not necessary to deal with those clauses which declare the contracts or transactions void or voidable on account of actual fraud.

These payments, if illegal, are only so in consequence of their being made contrary to the spirit of the 133rd section.

That section is the one against unjust preferences, which was so much discussed in *Davidson v. Ross*, 24 Gr. 22, and provides that "If any sale, deposit, pledge, or transfer be made of any property, real or personal, by any person in contemplation of insolvency, by way of security for payment to any creditor, or if any property, real or personal, movable or immovable, goods, effects, or valuable security be given by way of payment by such person to any creditor whereby such creditor obtains, or will obtain an unjust preference over the other creditors, such sale, deposit, pledge, transfer, or payment shall be null and void, * * and if the same be made within thirty days, * * it shall be presumed to have been made in contemplation of insolvency."

If this section had not been followed by one dealing expressly with payments, there would be much more force in the contention that a payment like the present might come within it, the other conditions being fulfilled, viz., that it was made in contemplation of insolvency, and had the effect of giving to the creditor an unjust preference.

But it has for years been the policy of the bankrupt laws to protect such payments when made *bonâ fide*, and when the person receiving the same had no notice of a prior act of bankruptcy.

In the English Bankruptcy Act of 1869, section 92, every conveyance or transfer of property, every payment made by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, with the view of giving such creditor a preference over his other creditors, shall, if the person making, &c., becomes bankrupt within three months, be deemed fraudulent and void as against the trustee; but it adds, "this section shall not affect the rights of a purchaser, payee, or encumbrancer in good faith, and for valuable consideration."

Our Legislature, by section 133, has invalidated transactions which, under the proviso to section 92 of the English Act, would have been protected, but the difference of the language used in the 134th section seems to shew conclusively that the Legislature intended to apply a different rule as regards payments made in the usual course from those transfers or deliveries by way of payment which are referred to in section 133. That section deals only with the act of the debtor, and declares that if in insolvent circumstances, and in contemplation of insolvency, a transfer is made by him, the effect of which is to give an unjust preference to one or more of his creditors, such transfer shall be void, although the creditors may have no knowledge that it was made in fraud of the Act; but the next section declares *a payment* to be void only under these circumstances:

1st. That the insolvent is unable to meet his engagements in full.

2nd. That the person receiving the payment knows of such inability, or has probable cause for believing it.

3rd. That the payment was made within thirty days next before the issue of the writ, &c.

Under the English Act, the Courts at an early day after its passing decided that the words "payee in good faith and for valuable consideration," extended to a creditor receiving payment from his debtor; and the chief Judge in bankruptcy in giving judgment uses language which is equally applicable to the case before us: "It is provided that the

enactment making void the payment shall not affect the rights of a payee in good faith and for valuable consideration, a provision which was obviously just, and not more just than necessary in order to avoid the inconveniences which would arise in the commercial world, and even beyond its pale if persons receiving payment of their just demands received such payment at the risk of having to refund it in consequence of the improper motives actuating the debtor, but of which they had no cognizance."

It is true, that if the case came within the 133rd section, the intent or motive of the debtor would be immaterial; but I quote the language of the learned Judge as shewing the manner in which payments of this nature have always of late years been regarded in the administration of the bankrupt law, and as furnishing a strong reason for the difference of the language employed by the Legislature when dealing with payments in the ordinary acceptation of the term, and as distinguished from the transfer of property or effects in lieu of payment.

If the construction contended for by the plaintiff be correct, this extraordinary result might follow, viz., that although the payment could not be impeached under section 134, though made within the thirty days, inasmuch as the creditor had no knowledge or suspicion of the debtor's insolvent circumstances, it might be liable to be impeached under section 133, though made at a more remote period than the thirty days. I think that the intention of the Legislature to be gathered from the whole Act is that payments made to a creditor who had no reason to believe that they were made otherwise than in the ordinary course of business, without any knowledge of his debtor's inability to meet his engagements, are not liable to be disturbed.

The nonsuit therefore was right, and the appeal should be dismissed with costs.

PATTERSON and MORRISON, JJ.A., concurred.

Appeal dismissed.

WILSON V. BEATTY.

Will—Construction of—Vested estate.

The testator, in the event of there being issue of the marriage of himself and his wife, devised half of his estate to such issue; if a son, on his attaining the age of twenty-five years; if a daughter, on her attaining the age of twenty-one years or marriage, "and in the event of there being no such issue * * born or if born not living within one year from my decease," then over.

A few weeks after the testator's death his wife had a son, who lived only a few days.

Held, affirming the judgment of SPRAGGE, C., that the gift over must take effect, as there was no child living at the end of the year.

Per PATTERSON, J. A., upon the true construction of the will, which is set out below, the legacy was vested in the son, subject to be divested upon the happening of the event in question.

The plaintiff asked the Court to determine her rights under the will of her late husband, which was set out in the bill, and the material parts of which were in the words following:—

I direct that my trustees shall as soon as may be after my decease have the accounts duly taken of the partnership business, known and carried on under the name style and firm of Frank Smith and Company, of which partnership the said Frank Smith and myself are the co-partners, and my share in the said business ascertained. I direct my trustees to invest my said share, together with all other real and personal estate of which I may be seized or possessed at my decease, in such securities as they shall deem good and sufficient. I direct my said trustees out of the produce or income of my estate to pay to my wife Mary Ellen Wilson one-half thereof during the time she shall remain my widow, and I direct my trustees to pay the other half thereof to my sister Catharine Wilson for her own separate use absolutely, but in the event of there being issue of the marriage of myself and my said wife then I direct my said trustees to cause the legacies to my said wife and sister so to be abated that such issue shall share equally with my said wife and sister in the produce or annual income of my estate until such issue shall have attained the age of twenty-one years or marriage, whichever shall first occur, and in case of the marriage again or death of my said wife, then from and after such event I direct that her share shall enure to the benefit of such issue.

For and notwithstanding anything hereinbefore contained I will devise and bequeath to such issue if a male, on his attaining the age of twenty-five years, and if a female on her attaining the age of twenty-one or marriage, one half of all my estate real and personal of what nature soever and wheresoever situated absolutely ; and in the event of there being no issue of the said marriage of myself and my said wife born or if born not living within one year from my decease, then I will devise and bequeath one half of my estate real and personal to my said sister Catharine Wilson to and for her own separate use absolutely, and in the event of the death of my said wife or of my said wife ceasing to be my widow, then I give devise and bequeath the other half, that is all, of my estate real and personal of what nature or kind soever and wheresoever situated, to my said sister in manner aforesaid, to her own separate use absolutely.

I will and direct, for and notwithstanding anything hereinbefore contained, that my said trustees, in the event of my sister's death before or after the whole of my estate become vested in her as aforesaid, shall pay my mother Margaret Beatty the annual income or produce thereof during her life, and in the event of my said mother's death then I will bequeath and devise all my estate real and personal share and share alike to Charles, Margaret, and Arthur Beatty, children of my said mother by her present husband Thomas Beatty, and in the event of the death of either of them then all share and share alike to the survivors of them.

The testator, who died in 1873, made this will in January, 1870, when about to start on a trip to England and Ireland, partly on business, but principally on account of his health, which was failing.

There was no issue of the marriage living at the date of the will or at the death of the testator, although the plaintiff had had several miscarriages ; but a few weeks after the testator's death the plaintiff gave birth to a son, who lived only a few days.

The construction of the will suggested in the plaintiff's bill was, that the estate bequeathed to the issue vested in the child so born, and had descended upon the plaintiff as his next of kin ; and that there was an intestacy as to one-half

of the estate, to which the plaintiff was entitled as widow of the testator and next of kin to her child, subject to the payment of the proceeds of one third of the estate to Catharine Wilson for her life.

The case was argued on the 7th January, 1878. (a)

J. A. Boyd, Q. C., (with him *Donovan*) for the appellants.

The will in question is framed with a view to two contingencies; one, the event of the testator dying without issue of his marriage; in which case—subject to a provision for the maintenance of his widow—he gives the whole of his estate over amongst his immediate next of kin in different interests. This event being more likely to happen, was chiefly in contemplation of the testator at the time of making his will, and is most prominent in the scheme for the disposal of his estate.

In this view alone the dispositions of the testator are reasonable and natural. He provides with half the income of his estate for the maintenance of his widow. Upon her death he gives that share of income to his sister Catharine Wilson; upon her death he gives the whole income to his mother; and upon her death the corpus of the estate is for the first time touched, and distributed equally amongst his brothers and sister of the half blood, Charles, Arthur, and Margaret Beatty. Catharine Wilson does not stand out in this will as an exclusive object of the testator's bounty; and no such intention pervades the will. No disposing power is given her over the estate; she is placed upon an equality with the wife; and only in case of her surviving the latter—an improbable event, since the wife is much her junior in years—does she succeed to the entire income of the estate. In no event whatever does she touch the corpus of the estate. Then Catharine Wilson is unmarried; the half-brothers and sister, Charles, Arthur, and Margaret Beatty, are young; and the true intention of the testator, which pervades the whole will, is, after providing a maintenance

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for his wife, sister, and mother, to bestow his estate equally amongst the said half-brothers and sister, in case there should be no issue of his marriage.

The other event contemplated by the testator and provided for by his will, is the possibility of there being issue of his marriage. At the time of making the will this event was not probable; and as the plaintiff had had several children born dead, the testator did not make provision for issue so prominent a feature of his will as if he had issue living at the time; but he does provide for such possible issue with one-half of his estate, and he leaves the other half thereof to be distributed between his wife and issue as upon an intestacy. The plaintiff's interest in the testator's estate, as derived from the child, is governed by the construction to be put upon the third clause of the will. The words of the gift are: "I will, devise, and bequeath to such issue, if a male, on his attaining the age of twenty-five years one-half of my estate, real and personal, absolutely." This gives an absolute vested interest to the child at the instant of his birth, and is so declared by the decree. There is no subsequent expression in the will indicative of an intention to divest the said gift; nor is there any condition that if there shall be issue, and such issue shall die, the said gift shall go over. The event of the death of such issue is not contemplated or provided for by the testator; and therefore the said gift, upon the death of the child, goes to the plaintiff as his next of kin. The gift to Catharine Wilson, under the third clause of the will, is entirely contingent upon "the event of there being no issue of the marriage of myself and my said wife born (or if born not living) within one year from my decease." If there is issue born within one year from the death of the testator, Catharine Wilson takes nothing; and it was clearly in contemplation that she should take nothing, under the clause in question, if a child was born to the testator. The sentence containing the words of gift to Catharine Wilson is awkwardly constructed, and the testator's meaning is inaccurately expressed; but it is

quite intelligible. What the testator meant was, that in case no child was born within a year from his death, then that Catharine Wilson should take half the income? of his estate. The words "within one year from my decease" clearly relate to the birth of the issue, and not to its "not living;" any other construction would be strained and unnatural. To give the sentence the meaning the testator intended it to bear, the words "or if born not living" should either be read within parenthesis, or transposed to the end of the sentence, so that it would read thus: "in the event of there being no issue of the said marriage born within one year from my decease, or if born not living (*i. e.*, being dead). By interjecting the words, "if born not living," into the middle of the sentence, the testator had in mind the miscarriages of the plaintiff, and the birth of his former children "not living:" and it was only upon a similar recurrence—of issue being born dead—that Catharine Wilson was to become entitled. The contingency contemplated by the testator is clearly the one of "no issue being born," and by no means that of such issue "not living." It could not reasonably be contended that the testator meant that the child should be living at the end of one year from his death in order to become entitled to one-half of his estate; the testator had already fixed twenty-five as the age at which he should enter upon the enjoyment of it, and he shared in the income thereof until twenty-one. The words used are, "within one year from my decease." Within a year means at any period in that interval, and applies as well to the beginning of the year as to the end; so that even taken in connection with the word, "living," this child answers the condition of "living within one year." If it is sought to give "within" the meaning of "during," then the child, to come within the condition, must have been born before the testator died in order to have lived during one year from testator's death; which shows conclusively that the testator never meant the "one year" to apply except to the birth of issue; and thus it is clear that the testator only required the

issue to be born within one year from his death in order to become entitled. The gift of the other half of the income of the testator's estate to Catharine Wilson upon the death of his wife, hinges upon the same contingency "of there being no issue of the said marriage born within one year from my decease;" but as that contingency did not happen, and as there was issue born within the year, Catharine Wilson takes nothing under the said second gift to her; and the same not being otherwise disposed of by the will, there is an intestacy in respect thereof. "The event of there being issue of the marriage" of the testator having happened, such issue became entitled to the one half the testator's estate devised to him; and there being an intestacy in respect of the other half, such issue and the plaintiff succeeded thereto, and such issue being now dead, the plaintiff, as sole next of kin, succeeds to the whole estate of such issue. The whole scheme of the will is incongruous upon any other hypothesis than that in case of issue the testator's estate should belong to such issue and the plaintiff; and in case "of there being no issue" that it should go over and remain amongst the testator's immediate relatives of the whole and the half-blood. They referred to *Boraston's Case*, Tudor's L. C. 713; *Hanson v. Graham*, Tudor's L. C. 726; *Doe d. Cadogan v. Ewart*, 7 A. & E. 636; *Jackson v. Majoribanks*, 12 Sim. 93; *Phipps v. Williams*, 5 Sim. 44; *Milroy v. Milroy*, 14 Sim. 48; *Parkins v. Knight*, 14 Sim. 83; *May v. Potter*, 25 W. R. 507; *Bland v. Williams*, 3 M. & K. 411; *Farmer v. Francis*, 2 S. & S. 505; *Parker v. Sowerby*, 1 Drew. 488; *Harrison v. Grimwood*, 12 Beav. 192, 198 and 199; *Lane v. Goudge*, 9 Ves. 225; *Snow v. Poulden*, 1 Keen 186; *Doe v. Lea*, 3 T. R. 41; *Doe v. Moore*, 14 East 601; *Hayword v. Whitby*, 1 Burr. 228; *In re Fitzgerald*, 26 W. R. 53; *Foster v. Cook*, 3 Bro. C. C. 347; *Harrison v. Foreman*, 5 Ves. 206, 209.

The Attorney-General (*J. O'Donohoe* with him) for the respondents. If the words, "not living," be read as "dying," as we contend they must be, the appellant, in the events

which have occurred, is clearly entitled to no more than the income of half the estate during her widowhood; and the respondent, Catharine Wilson, is entitled to one-half of the *corpus* of the estate, and to the other half subject to the appellant's right to the income of half during her widowhood. The will plainly shews that in no event did the testator intend the contemplated issue to have more than half the estate. The respondents rely on the reasons for this construction in the Chancellor's judgment. The intestacy for which the appellant contends is not to be presumed, but on the contrary the presumption is against such intestacy. The effect of the will as between the respondents was not argued, and the respondents did not and do not desire any judgment thereon.

March 4, 1878 (a). PATTERSON, J. A.—The contest before us turned chiefly on the true reading of the words, “In the event of there being no issue of the said marriage of myself and my said wife born *or if born not living within one year from my decease.*”

These words are intended to describe the event upon which certain dispositions mentioned in the will are to take effect.

The defendants contend that the event happened because the issue died within a year from the testator's decease.

The plaintiff's position is, that the event did not happen; because, in the very words of the clause, issue was born, and was living within the year.

The question of construction thus raised is by no means a simple one.

It becomes important from the plaintiff's standpoint, because her claim to anything beyond the income of half the estate during her widowhood is based upon what she contends is the effect of the birth of the son, and of his having been alive within the year.

We shall find it useful to consider whether the legacy

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of the one-half, which is given absolutely to the issue, was vested in the issue subject to be divested upon the happening of the event in question; or whether it was contingent upon the issue, if a son, attaining twenty-five, or if a daughter, attaining twenty-one or marrying.

In making this inquiry we must keep in view some general rules, which are thus stated in *Williams on Executors*, 6th ed., at p. 1137: "When a future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy or to the gift of it. In ascertaining the intention of the testator in this respect, the Courts of equity have established two positive rules of construction: 1. A bequest to a person *payable* or *to be paid* at or when he shall attain twenty-one years of age, or at the end of any other certain determinate term, confers on him a vested interest immediately on the testator's death, as *debitum in praesenti, solvendum in futuro*, and transmissible to his executors or administrators; for the words "payable," or "to be paid," are supposed to disannex the time from the gift of the legacy, so as to leave the gift immediate, in the same manner, in respect of its vesting, as if the bequest stood singly and contained no mention of time. 2. That if the words "payable," or "to be paid," are omitted, and the legacies are given *at* twenty-one, or *if, when, in case, or provided* the legatees attain twenty-one or any other future definite period, these expressions annex the time to the substance of the legacy, and make the legatee's right to it depend on his being alive at the time fixed for its payment. Consequently if the legatee happens to die before that period arrives, his personal representative will not be entitled to the legacy."

The terms in which the gift now in question is bestowed seem to bring it within the last mentioned rule, and to require it to be treated as contingent upon the attainment of twenty-five, unless from the other provisions of the will the intention that it should vest at an earlier period can be gathered.

The cases on this subject naturally differ in their circumstances with the variety presented by the structure of different wills, but certain principles of interpretation have long been settled and recognized by which the general rule governing a simple gift to a legatee at a certain age may be qualified.

One of these exceptions we find thus stated in *Williams on Executors*, 6th ed., at p. 1145. "Where a testator bequeaths a legacy to a person at a future time, and either gives him the intermediate interest, or directs it to be applied for his benefit, the Court there considers the disposition of the interest to be an indication of the testator's intention that the legatee should, at all events, have the principal; and on this ground holds such legacies to be vested."

The reason of this is more distinctly shown by the words of Sir John Leach, in *Vawdry v. Geddes*, 1 R. & My. 203, where he says: "When interim interest is given it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property."

It is unnecessary to notice the questions which have arisen in numerous cases as to the application of this rule when maintenance out of the income happened to be given, and not interest *eo nomine*, or those in which a discretion was given to trustees to apply the income to the maintenance of the legatees; because whatever is given to the legatee in the present case, during minority, is a definite share of the income from the estate. He is kept out of the operation of this exception by the circumstance that the income to be shared by him is that from the whole estate, and not from the half intended for him at twenty-five.

In place of indicating a separation of his half for the purpose of income, the indication is rather of a distinct trust in his favour during minority or until marriage: see *Merry v. Hill*, L. R. 8 Eq. 619, *per* Malins, V. C., at p. 625.

If the income to be enjoyed by the legatee had been that produced by the share of the fund eventually intended for him, it is possible that the circumstance of his not being

entitled to the whole of the income, by his exclusion between the ages of twenty-one and twenty-five, though a serious obstacle, might not of itself have been insuperable, as obstacles of a similar character were surmounted in *Davies v. Fisher*, 5 Beav. 202; and in *Harrison v. Grimwood*, 12 Beav. 192. Possibly the fact that his exclusion depended on the accident of his being a male, while a female would not have been excluded, might have been found as effective as the circumstances which in those cases enabled Lord Langdale to hold that the ordinary meaning of the words of the direct bequest was qualified: see *Fox v. Fox*, L. R. 19 Eq. 286.

But although the way in which the share of the income is appropriated prevents that provision from qualifying the natural signification of the words, "on his attaining the age of twenty-five years," there is nothing in it to increase their stringency or to weaken the effect of whatever else may tend to shew a vested estate.

We have to consider whether the gift over, or any other provision, or the general scope of the will, makes it proper to hold that the estate was vested.

In some cases the gift over, in the event of the legatee dying before attaining the age at which the legacy was to come into his possession, has been considered to affect the question of its being vested or contingent on his attaining that age.

In *Theobald on Wills*, the author, after referring to the decisions on the subject, says, at p. 279: "The truer doctrine appears to be, that a gift over upon death under twenty-one neither shews that the prior gift was meant to be contingent, nor has the effect of making it vested."

The unusual character of the gift over in the present case makes it unimportant to enquire whether this states with entire accuracy the result of the cases.

The event on which it is to take effect, whether we adopt the reading for which the plaintiff contends or that insisted on by the defendants, cannot be postponed beyond the year from the testator's decease. It must either occur

within the year by the child dying within the year, or it must become impossible by the fact of the child being alive within the year. Any other reading, as for instance that which would limit the gift over upon the death at any time before attaining twenty-five, is out of the question without a violent alteration of the language used by the testator.

This peculiarity distinguishes the will from all those which have received judicial construction in the cases which I have read.

Our search is of course directed to discover the intention of the testator. In this pursuit we have high authority in recent as well as in earlier decisions for looking at the consequence of one construction or the other, to assist us in forming an opinion of what his intention probably was.

Thus in *Re Deighton's Settled Estates*, L. R. 2 Chy. D. 783. James, L. J., said, at p. 785: "The Court leans strongly in favour of the early vesting of interests in cases where the effect of holding the share of a child of the testator to be contingent on his living to a future period would be that, if he died before that period, leaving a family, his children would take no benefit under the will."

In *Selby v. Whittaker*, L. R. 6 Chy. D. 239, Sir G. Jessel, M. R., said, at p. 248: "I take it that no rule of construction is better settled than that when two meanings are open to a Judge, and the one is reasonable and sensible, and the other, though not absolutely unreasonable in the sense of supposing that the testator must have been a lunatic, yet is extremely unlikely, he ought to select that meaning which is consonant to ordinary reason and not liable to the imputation of excessive caprice."

In the same case, James, L. J., uses very similar language, in one passage opposing the notion that the will he was considering gave a child who had lived only for a few moments a vested interest, only for the purpose of giving that interest to some person to whom no benefit was in any other way intended to be given by the testator.

Again in *Muskett v. Eaton*, L. R. 1 Chy. D. 435, dealing with a will which bequeathed a gift to Charles Muskett

for life, and then contained the words, "and in the event of his leaving a lawful son born or to be born in due time after his decease, who shall live to attain the age of twenty-one years, then I give the same farm and hereditaments unto such son and his heirs if he shall live to attain the said age of twenty-one years; but in case my said nephew should die without leaving a son who should live to attain the said age of twenty-one years," then over. The Master of the Rolls said: "The question is, whether the words 'attain the age of twenty-one years' are part of the description of the devisee, so as to bring the case within the rule laid down in *Festing v. Allen*, 12 M. & W. 279, where the gift was, in substance, a gift to 'such child of A. as shall attain twenty-one.' But it cannot be so. It is an immediate gift to the son of Charles Muskett, with a proviso as to his attaining the age of twenty-one years; because the words are, 'a lawful son born or to be born in due time after his decease,' and the testatrix must be taken to have known the course of nature, and if the child had been born within nine months after the death of the tenant for life, he could not have been twenty-one at the time when the particular estate determined. It is quite impossible that she could have intended the attainment of the age of twenty-one to be part of the description of the person to take. Therefore, in my opinion, the plaintiff [who was an infant son of Charles Muskett] takes a vested estate subject to be divested in the event of his dying under twenty-one; and I so decide."

The general scheme of the will before us does not seem to me very difficult to understand, although I confess it has cost me much time and attention to reach my present understanding of it. I can adopt, as very accurately expressing my mind, the language used by the Master of the Rolls in his judgment in *Selby v. Whittaker*, L. R. 6 Chy. D 239, 245, to which I have before alluded, viz., "I always distrust myself in construing these obscure instruments, because I know perfectly well that that which appears quite clear to the mind of one Judge may appear doubtful to the mind

of another, and may appear quite clear the other way to the mind of a third; and therefore when I say that I have a clear and positive opinion upon the construction of this will, it must be taken subject to that observation."

Some things strike one *in limine* as noteworthy. If the legacy did not vest, and if the child had happened to live to maturity, but yet had died under twenty-five leaving issue, that issue would have been excluded from all interest in the half of the estate intended for the parent, at all events during Catherine's life, as the original devise of the interest to Catherine would have secured a life estate to her; and would have had no interest in that part of the fund after her death, unless the construction prevailed which confines the ultimate gift to the mother and others to such estate as came to Catherine under the gift over, and so let the issue in as next of kin to the testator. Singularly enough the testator, in giving the share of income to his issue until twenty-one or marriage, makes no distinction between sons and daughters. He distinctly contemplates the possibility of a son marrying before twenty-one; and although he does not expressly provide for the issue of such marriage in case the parent dies under twenty-five, there is nothing to shew that he had any design to place his child, if it happened to be a son, in a less advantageous position than if it happened to be a daughter.

He has so worded the will as to create a difference which could not be overlooked in the practical construction of the instrument; but for the purpose of our attempt to eliminate the general scheme and intention, we may regard it as having crept in by inadvertence.

In trying to get a comprehensive grasp of the will as a whole, let us assume for the moment that the child had been a daughter, as we thus close the embarrassing gap between twenty-one or marriage and twenty-five.

The testator seems to have had in his mind two leading ideas, viz., to provide for the event of there being issue to inherit the estate, and the event of there being no such issue.

If there were no issue born, "or if born not living, within one year," from his decease, the disposition he makes is one half to Catharine absolutely, and the other half to the widow during widowhood, with remainder to Catharine; and after Catharine's death the whole over to others, whether the death of Catharine happens before or after the whole of the estate becomes vested in her *as aforesaid*, evidently meaning whether she died during the widowhood or not, till after the death or marriage of the widow. The disputed clause, whatever its true reading may be, is intended to fix the time or the event upon which it is to be ascertained that there is no issue to inherit; and upon which, therefore, these dispositions which result in the vesting of the whole in Catharine, *as aforesaid*, are to take effect.

If the event does not happen, these dispositions remain inoperative; and the provisions intended for the alternative event of there being issue to inherit will operate. We find them in the first part of the will, and they provide that until the majority or marriage of the child (whom we are assuming to be a daughter), the income is shared equally by the widow, by Catharine, and by the child; at marriage or majority one half of the *corpus* of the estate goes absolutely to the child, and the widow continues to enjoy the income of the other half during her life or widowhood, and at her marriage or death "her share shall enure to the benefit of such issue." It does not seem to make any difference whether we understand "her share" as meaning her half of the income, or the half of the estate which yielded her share of the income. The gift over of this share to the issue is not made subject to any limitation, and therefore the gift of the income passes the whole interest in the fund, and there is no intestacy as to it: *Clough v. Wynne*, 2 Mad. 188; *Jenings v. Baily*, 17 Beav. 118; *Blann v. Bell*, 2 DeG. M. & G. 775.

The phrase "for and notwithstanding anything hereinbefore contained," occurs twice in this will; but although it is an expression capable of giving emphasis to the directions it prefaces, it is not so used, and cannot be treated as

having more force than a simple conjunction, such as *and* or *but*. If one should read it as meaning more than this, we might have to construe the concluding paragraph as giving over the whole estate to the mother and the other relatives upon Catharine's death, notwithstanding that a son of the testator had attained twenty-five; a perfectly literal reading of the paragraph, but one for which no one would for a moment contend.

The intention to give over only what came through Catharine, and what vested in her by virtue of *the event* in debate, is so obvious that it reflects some of its significance upon the preceding paragraph, and makes it more clear that Catharine's interest in the widow's half of the estate was entirely contingent upon the happening of the event, and that unless the event upon which it was contingent happened, the gift to her was not meant to control or qualify the earlier gift of that half to the issue, expectant on the termination of the widow's estate in it.

I perceive no such intention as has been suggested to make the sister the principal object of the testator's bounty. On the contrary, her interests are made subordinate to those of the issue, and the latter are made paramount. If a child had lived, the only interest in the estate given to the sister was a share of the income till the child attained twenty-five or twenty-one, or married, as the case might have been. At that time the child was to take the half, and at the widow's death or marriage the whole of the estate.

Having regard to the circumstances I have noticed—the period within which the gift over to Catharine must have taken effect, if ever, being the year after the testator's decease: there being no devise over in the event of the issue, (if it survived the year,) dying under age; there being no express provision for children who might be left by a son who should happen to die under twenty-five; and yet no indication of a design to prefer the sister to such grandchildren; and applying the principles enunciated and acted upon in the cases to which I have referred, I am

of opinion that the child took a vested interest in the estate.

I think the proper construction of the will is, that the whole estate is bequeathed to the issue, subject to be divested if the issue is "not living within one year from the testator's decease," and subject, as to half of the estate, to the interest given to the widow during her widowhood; and as to the other half, to the interest given to Catharine until the time when the issue becomes entitled to enjoy it absolutely. By absolutely, I understand free from any further charge in Catharine's favour. It was not necessary to use the word as equivalent to "in fee," as applied to lands; nor is it so used, as is apparent from its occurrence in the gift over to Catharine, which after all was only a gift of a life estate.

This reasoning applies to the case of a son as well as to the supposed case of a daughter. Although the gap between twenty-one and twenty-five exists in the one case and not in the other, it does not touch the view upon which I have arrived at the conclusion that a vested interest was intended to pass. It could only have been of consequence if the vesting had been deduced from the appropriation of the income or interest, and even in that case I have shewn, upon authority, that it would not have constituted an insuperable objection.

The result, so far, being that the son took a vested remainder in his mother's half of the estate, expectant on the termination of her estate, and to which she would succeed as his next of kin; and that he took also a vested estate in the other half, the enjoyment of which was deferred until he should attain twenty-five; and which would devolve also upon his mother, although her possession of it would be deferred until the time when her son would have attained that age—*Williams on Executors*, 6th ed., 1295—we are brought to the enquiry if the event happened on which the whole interest was to go over, half in possession and half in remainder.

The plaintiff entrenches herself in what is undoubtedly

a strong position, the literal application of the words of the will. A child was born, and was living within the year.

The defendants say we must read "not living within a year," as if it were "dying within a year," or "ceasing to live within a year."

Each party can plausibly urge that the construction contended for by the other imputes to the testator caprice and want of intelligible purpose.

The defendants argue that although he contemplated the event of a posthumous child being born, yet, whatever may sometimes have been laid down as the *ultimum tempus pariendo*, he cannot have meant to provide for a child, as his offspring, who might be born at so remote a period as a year from his decease.

On the other hand the plaintiff points to the want of apparent reason for limiting the gift over upon death within twelve months, and not within thirteen months or thirteen years, or at any other time short of twenty-five years; and this is answered by the suggestion that no one but Catharine has a right to complain of the capricious character of the limitation; and that the imputation of caprice is no less strong if the design to benefit her is disappointed by the birth of a child who may not live an hour.

The rule laid down by Lord Blackburn in *Allgood v. Blake*, L. R. 8 Ex., at p. 164, and recently cited by himself in the House of Lords in *River Wear Commissioners v. Adamson*, L. R. 2 App. Cas. 765, must guide us: "We apprehend that no precise line can be drawn, but that the Court must, in each case, apply the admitted rules to the case in hand, not deviating from the literal sense of the words without sufficient reason, or more than is justified, yet not adhering slavishly to them, when to do so would obviously defeat the intention which may be collected from the whole will."

When we examine the words in question more closely it becomes apparent that the plaintiff's reading of them really silences words which must have been used intentionally and deliberately, and as having some force, namely,

the words "within a year from my decease," by making the phrase "not living," &c., as applied to a posthumous child equivalent to the one word "still-born." It reads the sentence as saying if no child shall be born, or if born, still-born, the estate is to go over.

The charge and counter charge of caprice which I have noticed, both of which are seemingly well founded, are answered, and a key is at the same time furnished to the construction, by the purpose of the testator on which my opinion as to the vesting of the estate is partly based, namely, the purpose to fix a time at which it is to appear whether or not there is issue to inherit the estate. He fixes the limit of time at a year. If a child is then surviving, he is the principal object of the testator's bounty; all the estate goes to him, subject to Catharine's interest for twenty or twenty-four years in the income, and the widow's interest during widowhood. But, with the perception that a gift over at the end of a year would leave unprovided for the event of the death, in the testator's lifetime or within a year after his decease, of such child as might be born—for it is not only a posthumous child that is contemplated—and as the gift over was meant to take effect at whatever time, not later than the year, it was ascertained that there was no issue, he employs the phrase which has caused so much contention. The phrase, "dying within one year," would not have expressed the whole idea, as the case of death in his lifetime would have been left out. The meaning apparently is, if at any time within one year there shall not be issue living, then over.

This rendering, though not embodied with critical precision in the clause, seems to me to give fuller effect to all the words than that for which the plaintiff contends, and at the same time to square with the intention, as I gather it, from the whole will.

Arriving thus at the same result as the learned Chancellor, though by a somewhat different process of reasoning, I think the appeal should be dismissed.

Moss, C. J. A.—It must be conceded that the task of interpreting this will is difficult and perplexing. As it deals with personal property only, it was said by counsel to come within the range of the observations attributed to the present Master of the Rolls in *Adolf v. Dolman*, 26 W. R. 54, which are thus reported :—" I have often said that sitting here I am not bound by the views of other Judges upon wills of personal property, however similar the terms of those wills may be to that I am construing. Personal property I say, and not real estate, because in the latter case the rules of construction are not so flexible, though of course there are some rules applicable to personalty, which are more or less inflexible." I do not know whether this view is generally entertained, but I observe that in *Wake v. Varah*, 45 L. J. Ch. 533, James, L. J., is reported to have said that, " It would lead to endless confusion and interminable litigation if the Courts were to make or find minute differences in the language of instruments for the purpose of escaping from the authority or apparent authority of previous decisions. With respect to wills in particular, it is far better to have settled rules which will enable the members of families to know what the law gives them, than that every variation of language used by a testator or his lawyer should entail on family after family the costs, the heartburning and the misery of litigation." I think, however, that it is clear that the Master of the Rolls would scarcely have chosen this case, if it had come before him, for making the observations I have quoted, because no authority has been cited, or, so far as I can find exists, which throws light upon the real difficulty in this will.

The question whether the gift of one-half of the estate to the testator's issue, if a male, on his attaining the age of twenty-five years, and if a female, on her attaining the age of twenty-one, or on marriage, is contingent or vested, raises some curious and interesting considerations, but it does not appear to be of practical importance in determining the rights of these litigants. The learned Chancellor, as I

understand his decree, held that it was vested, and my brother Patterson, whose written judgment I have had the opportunity of reading, is of the same opinion, although for different reasons. But, however that may be, it cannot be doubted that, if vested, it is subject to be divested. Whether contingent or vested, it would go over to the respondent upon the happening of the prescribed event, and then only. If that did not occur, there is no other gift to her in the will of half the estate. Hence the question to be solved is, whether in the events that have happened this half passed to her. If it did, it is beyond the reach of argument that the other half also passed to her, subject to the right of the appellant to receive the income during her widowhood. The direction of the will in that event is quite unmistakable.

After the bequest in the named event to the respondent, Catharine Wilson, of the half which had previously been given to issue on attaining the age of twenty-five years, the will proceeds:—"And in the event of the death of my said wife, or of my said wife ceasing to be my widow, then I give, devise, and bequeath the *other* half, that is *all*, of my estate, real and personal, to my said sister."

The plain meaning of this is, that the same event which might give her the half firstly mentioned should entitle her to the whole upon the death or marriage of his wife.

What then is the state of circumstances under which Catharine Wilson might thus become entitled? It is described by the words used immediately after the gift to a male child on attaining the age of twenty-five years, &c., namely, "and in the event of there being no issue of the said marriage of myself and my said wife born, or if born not living within one year from my decease." As his widow gave birth to a child about two months after the testator's death, and this child only lived a few days, the question is, whether that is a state of circumstances falling within the words, "or if born, not living within one year from my decease."

The appellant suggests two modes of reading this phrase,

either of which will suit her purpose. The one is, to place the words, "if born, not living," in a parenthesis, so that it will read thus: "In the event of there being no issue of the marriage of myself and my said wife born (or if born, not living,) within one year from my decease." The other is, to transpose these words to the end of the sentence, so that it would read thus: "In the event of there being no issue of the said marriage born within one year from my decease, or if born, not living."

The object of each suggestion is to couple the expressions, "born" and "within one year from my decease." They both involve the proposition that the testator intended the words, "within one year from my decease," to limit the period within which issue should be born. In my opinion it is wholly impossible to assent to this proposition.

Wide as has been the range of testamentary caprice, I venture to think that this is the first instance in which it has been supposed that a testator shewed an anxious care to provide for a child which his widow might bear an instant before the termination of twelve months from his decease.

There is authority, if any were needed, for the proposition that a knowledge of the ordinary course of nature must be attributed to a testator, and no clearer case for its application can be conceived. The appellant, indeed, is forced to contend that the testator contemplated the possibility of a child of his being born at any time within a year from his decease, because otherwise his construction of the will amounts to a simple erasure of the words "within one year from my decease."

It is, of course, clear that a construction involving this consequence is only to be resorted to in the last extremity. But in this case there is no insurmountable difficulty in placing an interpretation upon the words which does no violence to their ordinary signification, and is consistent with the general tenor of the will. The primary object of his bounty was a child, if one should be born; the next object of his bounty was his sister.

It was not unnatural that he should name a time when his sister's right should be ascertained. That time he has chosen to fix at a year from his decease. If at the end of that period there is no child living, then the gift over takes effect. It is true that the selection of such a period seems capricious, but it is not a caprice of which the appellant can complain.

From the beginning to the end of the will there is no trace of any intention on the part of the testator to bestow on her anything more than a share of the income of his estate. It may well be asked, what would become of her contention if the testator had fixed two years or five years instead of one year?

I take it to be clear that in that case the only possible construction is that which I suggest, and if we exclude the theory that he contemplated the birth of a child happening at any time within, and no matter how near the end of one year from his decease, the construction would have to be the same, whether one, two, or five years were specified.

I think that the appeal should be dismissed. The learned Chancellor ordered the costs to be paid out of the estate on account of the obscurity of the will, a direction which I think was reasonable and proper; but as the appellant was not content to accept his judgment, we do not feel at liberty to extend this indulgence, but we must order the dismissal to be, with costs, if they are pressed for by the respondent.

BURTON and MORRISON, JJ.A., concurred.

Appeal dismissed.

McEDWARDS, ASSIGNEE, V. PALMER.

Insolvent Act of 1875, secs. 3, sub-sec. j., 130, 132, 133—Preference—Power of Court of Appeal to correct entry on record.

A transfer of property by a debtor, which gives a creditor a preference over the other creditors is not necessarily void as one by which creditors are injured, obstructed, or delayed; and where such a preference was not made in contemplation of insolvency, and was not unjust, it was held valid.

The insolvent, six months before an attachment issued against him, conveyed his equity of redemption in certain lands to the defendant, upon trust to sell the same, and apply the proceeds, after payment of the mortgage, in payment of pre-existing debts due to the defendant and one T., and to pay over the surplus, if any, to the insolvent. The insolvent had previously failed to effect a sale of the land for more than the mortgage debt. It did not appear clearly what other property the insolvent had at the date of the deed, or what other debts he owed. The estate, however, which came into the hands of the assignee consisted of a watch, while the claims proved amounted to \$277.80. The evidence did not shew that the deed was made in contemplation of insolvency.

The learned Judge at the trial found that there was no fraud or preference in the making of the deed, and that it was a *bonâ fide* transaction.

Held, reversing the judgment of the Common Pleas, 28 C. P. 132, that the deed was not void under sec. 130 or 132 of the Insolvent Act of 1875, as the evidence did not shew that the creditors were injured, obstructed, or delayed; nor under sec. 133, as it did not appear that it was an unjust preference, or made in contemplation of insolvency.

Semble, per PATTERSON, J. A., that even if the equity of redemption was in substance the whole of the insolvent's estate, the conveyance thereof was not an act of insolvency within sec. 3, sub-sec. j., inasmuch as the insolvent was not in trade at the time, and the equity of redemption was stock-in-trade.

The learned Judge, who tried the case without a jury, really found a verdict for the defendant, as appeared from his notes, but a nonsuit was entered. The Court below made a rule absolute to enter a verdict for the plaintiff, although no leave was reserved, and no consent was given.

Held, that the Court of Appeal had power to correct the entry by the Judge's notes, or vary the rule.

THIS was an appeal from a judgment of Common Pleas, making absolute a rule *nisi* to set aside a nonsuit, and enter a verdict for the plaintiff, reported 28 C.P. 132. The pleadings and facts are sufficiently stated there, and in the judgment on this appeal.

The appeal was argued on the 19th January, 1878 (a).

M. C. Cameron, Q.C., and Osler, Q.C., for the appellants. The Court below exceeded its jurisdiction in entering a

(a) *Present*—MOSS, C. J. A., BURTON, PATTERSON, J. J. A., and PROUDFOOT, V. C.

verdict for the plaintiff, as leave was not reserved and no consent was given: *Lawrie v. Ratbun*, 38 U. C. R. 282; *Brown v. Shaw*, 1 App. R. 293; *Herbert v. Park*, 25 C.P. 675; 32 Vic. ch. 6, sec. 18, sub-sec. 2, O. 33 Vic. ch. 7, sec. 6, O., and 37 Vic. ch. 7 sec. 33, O., refer to verdicts and not to non-suits. The rule should have been discharged, as the grounds upon which it was granted were not stated therein as required by sec. 231 of the Common Law Procedure Act: *Montgomery v. Dean*, 7 C.P. 513; *Strange v. Dillon*, 22 U.C.R. 223. If the transaction was void *ab initio*, as the respondent contends, then he cannot recover the proceeds in an action for money had and received, but the transaction itself must be avoided: *Harris v. Buntin*, 16 U.C.R. 59; *Pardoe v. Price*, 16 M. & W. 457; *Rowntree v. Jacob*, 2 Taunt. 141; *English v. Blundell*, 8 C. & P. 332; *McPherson v. Proudfoot*, 2 C.P. 57. The payment of the \$350 does not come within section 134 of the Insolvent Act, 1875, as it took place more than thirty days before the attachment issued. Moreover it was not a payment by the insolvent. It cannot be presumed that the sale of the 110 acres was made in contemplation of insolvency, as the attachment did not issue till six months afterwards. Under the circumstances the onus of proving fraud was on the plaintiff, but the learned Judge found that there was no fraud or fraudulent preference. The evidence shews that the creditors were not "injured, obstructed or delayed" by the sale, but on the contrary that the estate was materially benefited, as the insolvent had failed in effecting a sale, and if the appellant had not paid the interest due and paid off the execution and held it till a good sale could be effected the land would only have realized enough to satisfy the mortgage debt. Nor does it come within section 133, as the preference was not unjust and the deed was not made in contemplation of insolvency. It cannot be held that the transaction was void under sub-sec. j of sec. 3 of the Insolvent Act 1875, as the insolvent was not engaged in trade at the time, and the equity of redemption was not stock-in-trade. Terryberry and McGreer should have both been parties to the suit. There was no

sufficient proof of the insolvency proceedings. The writ was merely produced: it was not shewn that it was regularly issued.

Kerr, Q.C., and *Boyd*, Q.C., for the respondent. The point as to there having been no proof of the insolvency proceedings was not taken in the Court below or in the reasons of appeal, and we should not be called upon to argue it now, as the evidence thereon is not set out in the appeal book. Nor was any objection made to the form of the rule in the Court below, or to the form in which it was sought to make it absolute, and it is unfair to that Court to allow such an objection to be taken in appeal. The notes of the learned Judge who tried the case shew that his finding was really a verdict for defendant, but a nonsuit was entered. The fair inference is, that whatever leave was necessary was reserved at the trial. At any rate it must be assumed that the Court below satisfied themselves that the proper leave was reserved before entering a verdict for the plaintiff. On the authorities, however, the mistake is a mere matter of form, and this Court have power to amend the finding of the learned Judge by entering a verdict for the defendant, and to amend the rule *nisi*: *Brown v. Shaw*, 1 App. R. 293; 37 Vic. ch. 7, secs. 11 & 11*a*., O. The objection to the absence of parties should not now be heard, as it was not pleaded that Terryberry and McGreer should be before the Court. The transaction in question was clearly an act of insolvency within the meaning of sub-sec. J of sec. 3 of the Insolvent Act of 1875, as the insolvent parted with the whole of his property without the consent, and without satisfying the claims, of his creditors. The conveyance was also void under the latter part of sec. 130. It was made in consideration of an antecedent debt, and no fresh advance was given. The appellant knew that there were other debts due by Cline and that these creditors would be defeated. It was unquestionably a gratuitous contract by which the other creditors were "injured, obstructed, and delayed." The payment of the \$350 is also void, as it was for the same pre-existing debt and was part of the same transac-

tion. There was no valid trust between the appellant and Terryberry whereby the latter could claim any of the proceeds of the sale of the land, and Cline or his assignee was therefore entitled to demand any portion of the purchase money not actually paid to him, which the assignee did. Under sec. 39 of the Insolvent Act of 1875 the respondent is authorized to bring this action to recover the proceeds of the sale, and the money paid by Mrs. Cline. The case of *Heilbut v. Neville*, L. R. 5 C. P. 478, shews that an action for money had and received will lie. If the transaction is void, as we submit it is, the whole of the \$1,000 received by the appellant should be paid into the Insolvent Court to be distributed under the Insolvent Act.

March 4, 1878. PATTERSON, J.A. (a)—Action for money received by defendant to the use of Cline, the insolvent, and for money received to the use of the plaintiff as assignee.

Pleas: 1. Never indebted.

2. Plaintiff not assignee as alleged.

3. Payment.

4. A plea on equitable grounds, which, if it amounts to any defence, is merely an expansion of the general issue.

Evidence was given by Cline and by the defendant respecting negotiations which led to the making of two conveyances which are shewn. One of them is a deed from Cline to the defendant, which recites that Cline owed the defendant \$550 and owed Terryberry \$400: that Cline had offered for sale his land, viz., lot 22, in the 2nd concession of Grimsby, excepting certain parcels theretofore sold by him; also that portion of lot 23, in the 3rd concession of Grimsby, below the brink of the mountain, the whole containing 110 acres more or less, with the view of realizing therefrom a sufficient sum to satisfy a mortgage existing on the same, and also to pay the whole or in part his indebtedness to different persons, and had been unable to obtain a purchaser: that

(a) *Present*.—MOSS, C.J.A., BURTON, PATTERSON, and MORRISON, JJ.A.

the defendant was desirous of obtaining a conveyance of any interest Cline might have in the lands, for the purpose of enabling him to dispose of the same at a price adequate to discharge the mortgage claim, and also to satisfy wholly or *pro tanto* the indebtedness to defendant and Terryberry; applying towards payment of Terryberry's claims one dollar for every four applied in payment of defendant's claims, including expenses, should the purchase money be insufficient to pay those claims in full; and handing over to Cline any sum there should be remaining after payment of the claims and expenses: that the mortgage covered another piece of land containing forty-five acres: and that it was agreed that in the event of the defendant effecting a sale, he should apply the proceeds in discharging the mortgage claim as well on the forty-five acres as on the other land; and then conveys the 110 acres to the defendant in fee.

The other deed is made between Cline and his mother. It recites the first mentioned deed, and that Cline is desirous of conveying the forty-five acres to his mother for \$350, which sum was to be paid to the defendant and Terryberry *pro rata* upon their respective claims, as soon as the defendant should have procured the discharge of the mortgage; and grants and releases all Cline's interest in the forty-five acres, being a strip of five chains in width off the southerly limit of lot 22 in the 2nd concession of Grimsby, containing ten acres, and that portion of lot 22 in 3rd concession, lying below the summit or brink of the mountain, containing thirty-five acres, more or less.

The defendant sold the 110 acres to Mr. McGreer for \$5,250, of which McGreer paid him \$1,000. McGreer is said by defendant to have assumed the mortgage, but it is not shewn that any change has been made in the actual security. The defendant paid \$300 out of the \$1,000 in discharge of the arrears due on the mortgage. The amount of the mortgage is stated as \$4,300, so that McGreer owes something yet. The defendant says he owes \$170, and perhaps the difference between that sum and \$250, which from the figures given he apparently should owe, may be

accounted for by the mortgage and interest and fines having been more than \$4,300, or in some other way not explained. McGreer gave his bond to Mrs. Cline to save her and the forty-five acres harmless from the mortgage, and she paid the \$350 to the defendant.

The deeds are dated 21st October, 1875, and the bond 17th March, 1876. The defendant says he received the \$1,000 on 4th January, 1876. He had received the \$350 before McGreer gave the bond, but on his own promissory note, which was given up to him when the bond was given.

The attachment in insolvency was issued on the 18th of April, 1876.

The plaintiff's claim is founded upon both the transactions, that by which the defendant received the payment for himself and Terryberry of the \$350, and that which resulted in the sale to McGreer and the receipt of money from him.

These transactions seem to me distinct in their character, and require to be considered separately. They are connected merely so far as the payment of the defendant's claim was an object in each of them. Regarded as dealings with the estate, they are independent; and the validity of each must be tested by the provision of the Insolvent Act under which it comes.

Let us first consider the \$350 transaction. Two persons whose names are connected with it are not before us, viz., Mrs. Cline and Mr. Terryberry. McGreer is also connected with it, for the money was paid over by Mrs. Cline on his guarantee, and he is not before us.

The plaintiff has elected to proceed against the defendant alone, and seeks to recover the whole money from him as money received to the use of the insolvent or to the plaintiff's use.

We have therefore to consider the matter simply as it stands between the immediate parties to the record.

It appears that when Cline wished the defendant to take the conveyance of the 110 acres, the defendant declined

unless he got something more ; and thereupon Cline sold to his mother his interest in the forty-five acres, and the defendant received the money on account of the debts due to him and Terryberry.

The bargain with Mrs. Cline, who already had an estate in dower in the land, the terms on which she agreed to pay the money, the advance of it to the defendant on the temporary security of his note, and the way in which she was ultimately satisfied by the bond of McGreer, are all shewn in detail ; but the substance of the whole is that Cline, having a valuable interest in the land, realized \$350 for it, and paid his two creditors the money.

It is indisputable that the defendant did not receive any part of that money to Cline's use. He can only be said to have received it to the plaintiff's use in case it was received under circumstances which, in connection with the subsequent insolvency, entitle the plaintiff as assignee of Cline to treat the money as an asset of the estate : *Pennell v. Aston*, 14 M. & W. 415.

The transaction was at the time of its occurrence perfectly straightforward and regular. It would not have been impeachable except under the provisions of the insolvent law. How is it affected by that law ?

The only section of the Act that seems to touch a payment such as this is sec. 134. That section provides that "Every payment made within thirty days next before * * the issue of a writ of attachment under this Act * * by a debtor unable to meet his engagements in full, to a person knowing such inability, or having probable cause for believing the same to exist, shall be void, and the amount paid may be recovered back by suit in any competent Court for the benefit of the estate."

Assuming the transaction to come within the words of that section, as to its merits, it was clearly beyond the thirty days ; for the latest date to which it can by any process of construction be attributed was the 17th of March, when the bond was given which made absolute the payment that had some time before been made conditionally, and the attachment did not issue till the 18th of April.

I am of opinion that no part of the \$350 can be held to be money received by the defendant to the use of the plaintiff.

Then we come to the affair of the 110 acres.

The deed of the 21st October was at its date unimpeachable. The sale to McGreer cannot be disturbed. A fair inference from the evidence is, that it would not be for the interest of any one, unless possibly McGreer, to attempt to disturb it.

The defendant says he has paid on account of the property \$886,78, which includes \$150 paid to Terryberry either as a private loan or out of the \$350, as well as I can make out. Some details are given of the other payments, and on the whole I should judge that the defendant has retained about \$300 of the \$1,000 received by him from McGreer.

This sum is really what is in dispute.

Let us consider the ground on which the plaintiff's claim must rest, waiving the inquiry whether Terryberry would not have been a necessary party to a bill to set aside the trust deed, and whether he should not also have been a party to a proper proceeding to recover the money which has taken the place of the land.

It is essential to the maintenance of the claim to the purchase money to shew that the deed could have been successfully assailed under the provisions of the Insolvent Act of 1875.

The plaintiff principally relies on sections 130 and 132.

The second part of section 130, which is the part applicable to dealings over three months before the insolvency, declares that "all contracts by which creditors are injured, obstructed, or delayed, made by a debtor unable to meet his engagements and afterwards becoming an insolvent, with a person knowing such inability or having probable cause for believing such inability to exist, or after such inability is public and notorious, whether such person be his creditor or not, are presumed to be made with intent to defraud his creditors."

And section 132 gives effect to the presumption by

declaring such contracts prohibited and void, repeating in nearly the same words as section 130 the requisite that they shall have the effect of impeding, obstructing, or delaying the creditors of their remedies, or of injuring them or any of them. See *Newton v. Ontario Bank*, 13 Gr. 653; *Davidson v. Ross*, 24 Gr. 76.

It is scarcely reasonable to ask us to hold on the evidence before us, particularly as the learned Judge at the trial did not so find, that this deed injured, obstructed, or delayed creditors. We are not told what debts Cline owed, except those paid off by the defendant, though the names of two other creditors are mentioned; nor are we told what other property he had at the date of the deed. He says, indeed, that his circumstances were poor, and he makes the loose assertion that he owed \$6,000 or \$7,000, including the mortgage of \$4,400; but surely something more specific than this is necessary to give operation to the statutory avoidance of the contract.

The assignee says that six months after the deed was made the estate that came into his hands was one watch, and that the total claims against the estate were \$277.80. This is all the information he gives, except that the inspector is a man who has not proved any claim, and that he himself was appointed assignee by a resolution formally noted in his minutes of what he calls a meeting, as moved and seconded by persons who were not there at all, but for whom the attorney acted who is bringing this action. As to the action, he says: "I gave no instructions for this action to be brought. Again, I think I did. I won't be positive. I don't know what this action is for. I know nothing about it."

We are not told how the apparent discrepancy is reconciled between the \$277.80 and Cline's random estimate of his debts, whether those debts did not in fact exist, or had been paid off, or had merely not been proved. We are not even told that the attaching creditor or creditors, who to be entitled to attach must have held \$200 of the \$277.80, and who probably held it all, were creditors at the date of the deed.

On the other hand we are told that Cline had ineffectually tried to sell the farm for anything more than the mortgage debt; and that the conveyance was made with the hope that under the defendant's management a better sale might be effected. The expectation was not disappointed, although the success of the plan, which we may, without unfairness, surmise to have suggested the insolvency proceedings, seemed so little likely that when the defendant, as he tells us, wanted Grant and Terryberry to go in with him, and help to bear the burden and share the profits, they both refused to do so.

This being the character of the evidence, and the Judge at the trial having expressly found that there was no fraud or preference in the making of the deed, and that all that was done was done *bonâ fide* by both parties, the plaintiff should only be allowed to succeed upon shewing that the law is very clearly on his side. In my opinion he has failed to shew that.

I think it would be proper to uphold the nonsuit, even if we did not look beyond sections 130 and 132, because we cannot say upon the evidence that the Judge should have held that the creditors were injured, obstructed, or delayed. But there is in my judgment a more serious obstacle in the plaintiff's way. I do not think the case comes at all within sections 130 and 132. I regard it as belonging not to the class of cases in which creditors are injured, obstructed, or delayed, but to the class in which one creditor obtains a preference over the others, which is the class dealt with in section 133.

Attention is called to the distinction in *Kerr* on Fraud and Mistake, at p. 212, where the author says: "Transactions which have for their object the defeating or defrauding of creditors, must be carefully distinguished from cases where a sale or assignment, or other conveyance, merely amounts to giving a preference to one creditor, or to one set of creditors over another, or where the assignment or conveyance is made for the benefit of all creditors."

In the Insolvent Act of 1864, section 8 related to frauds

and fraudulent preferences. Sub-sections 1, 2, 3, and 4, of that section corresponded respectively with sections 130, 131, 132, and 133, of the Act of 1875, except that sub-sections 1 and 3 did not contain the words, "whether such person be his creditor or not." Those words were introduced into sections 86 and 88 of the Act of 1869, and continued in sections 130 and 132 of the present Act. The amendment was probably made in consequence of the decision of the present Chancellor, then Vice-Chancellor, in *Newton v. Ontario Bank*, 13 Gr. 662, that sub-sections 1 and 3 did not apply to transactions between an insolvent and his creditors; an opinion which seems to have been adopted in the Court of Appeal by VanKoughnet, C., and some of the other Judges, but which was expressly dissented from by Mr. Justice Adam Wilson. It is now placed beyond question that creditors as well as strangers are within the prohibition of sections 130 and 132.

It does not appear to me, however, that the amendment can have been intended to have, or that it has had the effect of extending the class of prohibited transactions.

Transactions, whether with creditors or strangers, by which creditors are injured, obstructed, or delayed, are (in the circumstances mentioned in the sections) prohibited and avoided; but it does not follow that a transaction which merely gives one creditor a preference over the others, is meant to be described as one by which creditors are injured, obstructed or delayed.

These words are like those used in 13 Eliz. ch. 5, "Delay, hinder, and defraud creditors," which had long been construed as excluding mere cases of preference. A preference is ordinarily given either by a transfer of property in security or in payment, or by a payment in money. The statute deals with both these cases in sections 133 and 134. When a preferential transaction is intended to be dealt with, the provision states, without ambiguity, what is meant; and I do not doubt that the framer of section 133 would not have failed to supplement the words "injured, obstructed or delayed," by adding the words, "or by which

a creditor obtains, or will obtain, a preference over the other creditors," if that was intended. Besides this, notice the harshness which the construction involves.

The transactions covered by the sections are avoided, whatever length of time may elapse before the insolvency, and however remote from the apprehension of either party the contemplation of insolvency may be. The inability of the debtor to meet his engagements may arise from the impossibility at the moment of realizing his assets, and the contract or conveyance may be a pledge of property to secure the debt till the stringency passes, and to prevent the sacrifice of property until the time when it may be reasonably hoped the debtor will be able again to meet his engagements. Yet its effect in the end may be to disappoint the bulk of the creditors, and to prefer the one, and in that sense to injure some of the creditors, or to obstruct or hinder them in their remedies.

Section 133 would allow the transaction to stand if not made in contemplation of insolvency, and if the preference were not an unjust preference; but the earlier sections admit no such qualification under them. The one question would be, were the creditors injured?

To construe the words in question as including contracts, conveyances, or acts by which a creditor obtains a preference over others would be to bring the same transaction under the provisions of separate clauses, under one of which it would be treated with a degree of harshness unknown to the other, and so unlike in spirit to the general policy of the Act as to savour of caprice.

Similar words are found also in the statute of the province of Canada, 22 Vic. ch. 96, secs. 18 and 19, which formed secs. 17 and 18 of Consol. Stat. U. C. ch. 26, and are now ch. 118 of the Revised Statutes, but they are used in the signification given to them under the statute of Eliz., and appropriate words are added to designate preferential transactions. The words there are, "with intent to defeat or delay the creditors of such person, or with intent thereby to give one or more of the creditors of such person

a preference over his other creditors, or over any one or more of such creditors."

The deed now in question conveys the land to the defendant in trust to sell it—to pay himself and Terryberry, if there is money enough—and to hand any surplus there may be to Cline.

There is nothing in the trust in Cline's favour to injure, obstruct, or delay creditors. If the whole trust had been to sell and pay Cline the money, the creditors could have taken the land while unsold, or the money it produced. Besides, we have to do with the actual not the possible operation of the deed, and we know that no part of the purchase money would have reached Cline. The whole actual operation was to enable the two creditors to get part of their debts paid. The deed was a transfer of property by way of security for payment, or by way of payment, whereby these creditors obtained a preference over the others. It is precisely the transaction dealt with by section 133, and avoided; not absolutely as it would be if it came under section 130; but in case two conditions existed, viz., that it was made in contemplation of insolvency, and that the preference was unjust.

It has been shewn in the judgments delivered in *Davidson v. Ross*, 24 Gr. 22, that contemplation of insolvency means in this section what contemplation of bankruptcy means as used in English decisions.

There is no presumption here that the deed was made in contemplation of the insolvency which did not occur till six months after its date; and the evidence does not lead to the belief that it was in fact so made. It tends very strongly to rebut any such idea; and I should not be inclined to assume that of necessity the preference obtained by the defendant was under the circumstances unjust.

In the judgment now in review some stress is laid on the circumstance that the equity of redemption conveyed by the deed was in substance the whole of Cline's assets, and that the conveyance was therefore an act of insolvency within sub-section *j.* of section 3, which declares that a

debtor shall be deemed insolvent if being unable to meet his liabilities in full he makes "any sale or conveyance of the whole or the main part of his stock-in-trade, or of his assets, without the consent of his creditors, or without satisfying their claims."

It was argued by Mr. Cameron that in this case the insolvent not being at the time in trade, and the equity of redemption not being stock-in-trade, or assets *ejusdem generis*, the transaction was not within the subsection.

I am inclined to think the objection is a good one; but it is not necessary to decide the point.

It was not argued before us, and I do not know that it has ever been held, that under our statute a transaction is void as being an act of insolvency, when it is not the act on which the proceedings in insolvency are based, as it was in the cases of *Wilson v. Cramp*, 11 Gr. 444, and *Thorne v. Torrance*, 16 C. P. 445, 18 C. P. 29; or that even in such cases it is void unless it comes within some of the provisions of section 130, or the following sections. In the present case, as the transaction is so clearly of the class to which section 133 applies, it cannot be held to be void unless under the provisions of that section.

For these reasons it is proper, in my opinion, that the nonsuit entered at the trial should be allowed to stand. The judgment of the Common Pleas seems to have proceeded on the understanding that a verdict had been entered for the defendant, which appears to be the import of the learned Judge's note of his finding, and which would, under the Law Reform Act, have authorized the Court to enter the verdict for the plaintiff. But a nonsuit, and not a verdict for the defendant, was actually entered on the record; and this, in the absence of consent, confined the power of the Court to the granting of a new trial, as we had occasion to point out in *Brown v. Shaw*, 1 App. R. 306.

The objection now taken by Mr. Osler to the form of the rule might, if we thought the plaintiff ought to succeed, be

met either by correcting the entry by the Judge's notes, if the entry is not what was intended, or by varying the rule.

Being of opinion that the rule *nisi* ought to have been discharged, I think the appeal should be allowed, with costs.

MOSS, C.J.A., BURTON, J.A., and PROUDFOOT, V.C., concurred.

Appeal allowed.

INGLIS V. JAMES BEATY.

Trustee and cestui que trust—Acquiescence in breach of trust—Interest—Annual rests.

A *cestui que trust* will not be estopped from objecting to the amount of the trust fund on the ground of acquiescence, merely because he did not dispute its correctness while his interest was reversionary; especially where, as in this case, he was not in possession of all the material facts, and his interest was not vested.

The principle upon which the Court acts in charging executors with interest, is not that of punishment, but of compensating the *cestui que trust*, and depriving the trustee of the advantage he has wrongfully obtained.

An executor will not necessarily be charged with compound interest in all cases, except those in which there is a mere neglect to invest.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many years, without objection from those interested under the will, and it did not appear that he had used the money in trade.

Held, reversing the decree of BLAKE, V. C., that under the circumstances he was only chargeable with simple interest.

THIS was an appeal from the order of Blake, V. C., dismissing an appeal by the defendant from the Report of the Master at Toronto in an administration suit.

In 1819, Armstrong, the testator, and the appellant, James Beaty entered into business as cordwainers in co-partnership without any written articles. They were brothers-in-law, and the deceased, who was unmarried, resided with the appellant. The business was by no means extensive, and no regular books were ever kept. The partnership continued until the death of Armstrong on the 23rd of February, 1843. On the 18th of November, 1836, Armstrong made a will, by which he devised all his property to the appellant and to William Beaty and John Beaty, as executors and trustees, and probate was granted to them on the 6th of June, 1843. By this will he directed his executors to obtain a valuation of all the real property he should die possessed of, held in the name of the firm, or of himself or of his partner, and purchased with the funds of the partnership, and to give his partner the option of purchasing at the valuation. It recited that he held in his own name a deed from John Robertson for the east half of lot No. 5 in the 4th concession, new survey, of the township of Trafalgar, which was given to secure the repayment of £150 of the funds of the partnership lent to Robertson, and directed the executors upon repayment to reconvey to Robertson; but in default of payment within six months after his demise, they were to sell the property and to account to the partnership for the proceeds. After providing for the payment of his debts and two small pecuniary legacies, it directed that the residue of the proceeds of his estate should be held by the executors in trust during the lives of his mother, his brother, and his sister, Mrs. Carroll, and that the executors should pay to his mother annually during her life one-half the interest or proceeds of the estate, and the other half to his brother and sister equally during their lives. It contained a residuary clause by which the testator gave all the estate, real and personal, that might be remaining after the death of his mother, brother, and sister, to the children of his sister then living.

William Beaty and John Beaty both died before the

commencement of the proceedings for administration, and by consent the accounts were taken against the appellant, as surviving executor, without their estate being represented.

A valuation was made of the testator's interest in certain real estate, not including the lot in Trafalgar, and the appellant accepted the same at the price of \$3,500, and on the 6th May, 1844, received a conveyance from his co-trustees.

Shortly after the testator's death an inventory of stock was taken. A memorandum was produced in the handwriting of Robert Beaty, a nephew of the appellant, which contained the only statement of the affairs of the estate that appeared to have been prepared. As it will be the subject of frequent reference, it is convenient to state it verbatim.

AMOUNTS OF INVENTORY OF STOCK, &C., OF THE FIRM OF ARMSTRONG
AND BEATY, AS TAKEN 20TH MARCH, 1843.

Notes and accounts due by us :

Notes to Wm. H. Hoople, dated 12th Nov., 1842, at 6 months	£1,125	0	0
Difference of Exchange on New York.....	33	15	0
Note to Bank of Upper Canada, dated 6th February, 1843—60 days	220	0	0
	<hr/> £1,378 15 0 <hr/>		
Leather, &c., on hand	£283	9	10
Note and accounts (good) due us	736	8	2
	<hr/> 1,019 18 0 <hr/>		
Leaving a balance by stock of	358	17	0
	<hr/> £1,378 15 0 <hr/>		

ESTATE OF THE LATE WILLIAM ARMSTRONG WITH JAMES BEATY.

1843.

Dr.

March 20—To half of balance, £358 17s. 0., due by the firm of Armstrong & Beaty, after deducting stock, &c.	£179	8	6
Funeral expenses	50	0	0
Legacies to W. & M. A.	75	0	0
May—Bringing out Carroll's family as agreed upon before decease	52	0	0

1844.

May 6—To balance due W. A.'s estate	493	11	6
	<hr/> £850 0 0 <hr/>		

1844.

May 6—By valuation made of real estate belonging to the firm at W. A.'s decease.....	£850 0 0
	<hr/>
	£850 0 0

1844.

May 6—By balance	£493 11 6
	<hr/>
	<hr/>

In this statement there was an error of £25 in the valuation of the real estate, which should have been £875 instead of £850, and on the other hand the appellant paid £67 instead of £52 towards bringing Mrs. Carroll to this country. The result was, that upon the footing of that statement the amount in the hands of the appellant was \$2014.30. He himself always treated the amount as \$2,000. The testator's mother died during his lifetime, and his brother shortly after his decease; and the appellant, up to the time of the death of Mrs. Carroll, on the 6th November, 1867, paid her the interest at six per cent. upon the sum of \$2,000.

The other facts, so far as material, are set out in the judgment of Moss, C. J. A.

On the 15th of January, 1877, the common administration order was made, upon the application of Mrs. Inglis, a daughter of Mrs. Carroll, and one of the persons entitled to the residue upon her decease. On the 5th of November, 1877, the Master made his Report, by which he found that in making up the account of the partnership assets and liabilities, the appellant put down as one of the liabilities of the partnership a promissory note to William H. Hoople for \$4,500, which in the statement of the assets and liabilities brought into the Master's office was entered as a promissory note to Dr. Widmer for the same amount, but which on the evidence before him he disallowed as one of the liabilities of the partnership, and charged the appellant with one half the amount, viz., \$2,250, as part of the estate of the testator come to his hands. He also found that the testator and the appellant were at the time of the testator's death beneficially entitled to the parcel of land in Trafalgar already referred to, and he charged the appellant,

who had obtained a conveyance of the legal estate in this land and sold it, with \$1,000, being half its value. He also found that the testator and appellant were joint owners of certain lands on the corner of King and George streets, in this city, which were afterwards sold by the appellant, whom he charged with half the purchase money, being the sum of \$2,420. Upon these sums he also charged the appellant with interest from the date of Mrs. Carroll's death, at six per cent. with annual rests. From these findings the defendant appealed to the Court, and further objected that the Master should have allowed him the usual commission as executor.

On the 6th of December, 1877, Blake, V.C., after hearing argument, made an order dismissing the appeal, with costs.

The defendant appealed.

The following were the reasons of appeal :

1. It should have been held that the Master in and by his report should have allowed to the appellant the sum of \$4,500, as one of the liabilities of the partnership of the late firm of Armstrong & Beaty.

2. It should have been held and declared that the said Master by his report should have found that the east half of lot No. 5, in the 4th concession of the Township of Trafalgar, was the absolute property of the appellant, James Beaty, and should not have charged the said appellant with the sum of \$1,000 with reference to the said half lot.

3. The said Master, by his said report, should not have found that the testator and the said James Beaty were, at the time of the death of the testator, tenants in common of certain lands, situate at the corner of King and George streets, in the city of Toronto ; nor should he have charged the said James Beaty with the sum of \$2,420 with reference to the said lands, but the said Master should have found that the said James Beaty was merely a trustee of the same for the stockholders of a certain company, known as the Sydenham Arms Hotel Association.

4. It should have been held and declared that the said Master should not have charged the said appellant with

interest upon the sum of \$5,670 at 6 per cent., with annual rests.

5. It should have been held and declared that the said Master should not, by his said report, have charged the said James Beaty, in any event, with more than six years interest on any principal money in his hands.

6. It should have been held that the said Master should, by his said report, have allowed to the said defendant the usual commission, as executor, upon moneys received by him as such.

The reasons against the appeal were :

1. The Master who decided the case originally saw the witnesses, and was enabled to determine as to their veracity, and decided upon the weight to be given to such evidence, and the Appellate Court will not interfere with his ruling.

2. There was no evidence sufficient in law to support the alleged payment of \$4,500. The evidence of the defendant himself as to this is contradictory, and not worthy of credit.

3. The evidence shows that at the death of Armstrong he was beneficially entitled to the Trafalgar lot.

4. The defendant fraudulently appropriated the estate of the said Armstrong for his own benefit, and is properly chargeable with rests.

5. No request was made to the Master for the allowance of commission.

6. The defendant is not entitled to receive any compensation.

The case was argued on the 16th of January, 1878, (a.)

C. Moss, with him *R. G. Barrett*, for the appellant.

J. A. Boyd, Q. C., with him *W. Cassels*, for the respondent.

March 4, 1878, Moss, C. J. A., delivered the judgment of the Court.

Upon the argument the learned counsel for the appellant, while insisting that the claim with respect to the

(a) *Present*.—Moss, C. J., A. BURTON, PATTERSON, and MORRISON, JJ.A.

property on the corner of King and George streets had been advanced in an honest belief, which the appellant still entertained, that it was founded in justice, conceded that in point of law it could not be sustained.

The first question for our consideration is, the propriety of the disallowance by the Master of the \$4500, as one of the liabilities of the partnership. In addressing himself to this point the learned counsel observed strongly upon the great delay in commencing proceedings against the appellant, who has been placed at a serious disadvantage by the death of witnesses, and the great length of time that has elapsed since the transaction in question. He referred especially to Dr. Widmer, and to Wm. Beaty, one of the executors; but the former appears to have died many years before Mrs. Carroll, and it is abundantly clear that the latter had little or no personal knowledge of the transaction in question.

The case of *Browne v. Cross*, 14 Beav. 105, was cited in support of the argument that the respondent and the other reversioners should not now be permitted to question this statement of the partnership affairs, upon which the appellant had so long acted without objection. But the true limits of this doctrine were defined by Lord Justice Turner and Lord Campbell in the later case of *The Life Assurance Co. v. Siddal*, 3 DeG. F. & J. 72, which has, I believe, been ever since accepted as an authoritative exposition of the law upon the subject. The Lord Justice said: "The respondent's argument, however, was mainly rested upon length of time, independently of any statutory limitation, and upon acquiescence. So much discussion has of late arisen upon this subject that it may be as well to state the general view which I entertain upon it before entering upon the facts of this particular case. Length of time where it does not operate as a statutory or positive bar, operates, as I apprehend, simply as evidence of assent or acquiescence. The two propositions of a bar by length of time and by acquiescence are not, as I conceive, distinct propositions. They constitute but one proposition, and

that proposition, when applied to a question of this description, is, that the *cestui que trust* assented to the breach of trust. A *cestui que trust* whose interest is reversionary is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not seem to me to bear upon the question of his assent to a breach of trust. He is not, so far as I can see, less capable of giving such assent when his interest is in reversion than when it is in possession. Whether he has done so or not is a question to be determined on the facts of each particular case. The respondents relied much upon some observations which fell from the Master of the Rolls, in the case of *Browne v. Cross*, 14 Beav. 105, seeming to import that if a *cestui que trust* knows of a breach of trust, he is bound, although his interest may be reversionary, to take proceedings to have the matter set right, and will be held bound by acquiescence if he does not promptly do so; but this broad proposition was not necessary to the decision of that case, and with all deference to the Master of the Rolls, if he intended to lay down this proposition thus broadly, which I doubt, I am not, as at present advised, prepared to assent to it. It is the duty of the trustee to observe the trust, and to preserve the property for the benefit of those entitled in remainder, and I am not prepared to hold that he can be permitted to escape from the liability incident to that duty by simply informing the *cestui que trust* that he has committed, or intends to commit, a breach of it." He afterwards adds, that he is not prepared to say that where the trust is definite and clear, a breach of trust can be held to have been sanctioned or concurred in by the mere knowledge and non-interference of the *cestui que trust* before his interest has come into possession. He then points out that, in cases of this sort, acquiescence imports full knowledge, and treats it as a settled rule that a *cestui que trust* cannot be bound by acquiescence unless he has been fully informed of his rights and of all the material facts and circumstances of the case.

The Lord Chancellor agreed in this explanation of the general doctrine, adding, however, at p. 77 : "That although the rule be that the onus lies on the party relying on acquiescence to prove the facts from which the consent of the *cestui que trust* is to be inferred, it is easy to conceive cases in which, from great lapse of time, such facts might and ought to be presumed."

In the recent case of *Butler v. Carter*, L. R. 5 Eq. 279, the Master of the Rolls, in dealing with a case of acquiescence by a tenant for life, observed that it would bar the claim of her legal personal representatives to the dividends which would have accrued during her life or widowhood, but that it could have no effect on the rights of the persons entitled in reversion after her decease.

In the present case there is a special reason why the respondent should not be held to have been bound to take any steps during her mother's lifetime.

The gift of the residue is to the children who should be alive at the time of their mother's death, and until that time none of the children had any vested interest. That this was the construction which the appellant himself placed upon the will is apparent from some of the correspondence. In December, 1865, while Mrs. Carroll was still alive, the respondent's husband wrote to the appellant with reference to the estate. There is no copy of this letter, but its tenor, as well as the attitude assumed by the appellant, is sufficiently shewn by the reply written by the appellant's solicitor. It states that the appellant "has received your letter of the 21st instant, making enquiries as to the estate of the late William Armstrong, at the same time threatening in an unseemly manner judicial investigation about matters with which you cannot be acquainted. He does not now, in requiring me to write to you, recognize your right to make any demands about the estate." It also distinctly denies the right of Mr. Inglis "as yet" to demand statements. Still, as the letter expresses it, "merely for the purpose of shewing his willingness not to be unreasonable, and without prejudice, in case you deem it neces-

sary to have the judicial investigation—if you can have it—which you threaten,” he gave the following figures and statements:—

“The real estate pursuant to the will was valued by three disinterested persons, who executed a deed with the executors to Mr. Beaty of the lands, at the price for which they were valued, as he had the right to purchase at that valuation. The deed contains all the particulars, signed and sealed by all parties, valuers, trustees, and is conclusive evidence of the facts stated therein:—

Lands, valued at	£875	0	0
Debts and liabilities of partnership	£1378	15	0
Assets, personal estate, partnership	1019	18	0
	<hr/>		
	£358	17	0
	<hr/>		
Half of which charged to estate..	£179	8	6
Specific legacies	75	0	0
Funeral expenses	50	0	0
Paid an account of Mrs. Carroll and family in coming to this country	52	0	0
	<hr/>		
		356	8 6
	<hr/>		
	£518	11	6

“The balance at credit will therefore be £518 11 6, which is secured by debentures at six per cent interest, which has been paid regularly to the parties entitled.”

To this letter Mr. Inglis replied promptly, complaining of the unsatisfactory character of the information supplied, and stating that, confiding generally in the integrity of Mr. Beaty, the persons beneficially interested in the estate were unwilling to believe that the interests of Mrs. Carroll and her children would be disregarded, but they never could acquiesce in the justness of any valuation which placed Mr. Armstrong's estate at £500.

In this position matters seem to have remained until after the death of Mrs. Carroll, when a letter was written by the appellant's solicitors to the respondent, who was residing at Owen Sound, requesting her to attend at their office to receive her share, and to give a release. To this

communication she promptly replied that before she could consent to release her claims upon the estate she would require a full statement, without which she alleged a proper settlement could not be arrived at, as she was not informed of the particulars necessary to a proper understanding of her rights, or to the ascertainment of their extent or value. She added, that as soon as she was informed that such a statement was ready, or as soon as a copy was forwarded to her, she would examine the same with a view to a final settlement of the matters connected therewith. There is no evidence of any further communication between the parties before the commencement of the litigation.

In view of the principles enunciated by Lord Justice Turner, it is impossible to hold that the respondent is precluded upon the ground of acquiescence from insisting upon satisfactory proof that at the death of the testator the partnership was liable for this sum of \$4,500. It is clear that there was no statutory or positive bar. It is equally clear that the mere lapse of time did not amount to acquiescence in the account, or a binding assent to its correctness. Under the circumstances no obligation was cast upon the respondent to question the appellant's dealings until Mrs. Carroll's death. Her very right to do so had been emphatically repudiated by him. He had then given her such information as he thought proper, but it cannot be said that it was a complete or sufficient statement. After her mother's death she renewed her demand for fuller particulars, but, so far as appears, met with no response. She states in her evidence that she never saw any statement: that Mr. Beaty would give no satisfaction: that he never gave any proof of the £1,100 being paid: that he refused to give any items.

No doubt she knew from an early period, probably as far back as 1850, that Mr. Beaty claimed that he had paid this large sum on account of the debts of the firm, but she denies that she knew, and she is not proved to have known the particulars of the transaction. I think that the lapse of

time is a fair ground for making every reasonable presumption in favour of the appellant, but beyond that length its effect cannot reach. But while he is entitled to the benefit of this view, there is no escape from the conclusion that the onus is upon him of proving in a reasonably satisfactory manner that there were liabilities of the partnership to the amount of \$4,500, which he paid, and by which the value of the assets that came to his hands was diminished. After a careful examination of all the evidence, written and oral, I am of opinion that the learned Vice-Chancellor was right in upholding the Master's decision upon this point. The first piece of evidence offered in support of the appellant is the statement, which has already been set out at length. This, as I have remarked, was undoubtedly made soon after the testator's death. Its natural import, if no extraneous explanation were given, is that Hoople held a note of the firm for £1,125, due on the 25th of May, 1843. It would thus appear to be a liability existing at the time of Armstrong's death. Hoople was a correspondent of the firm in New York, with whom they had had considerable transactions. They were in the habit of sending him their notes, which he procured to be discounted in order to meet claims against them, and they made remittances to enable him to retire the notes. No note corresponding to the description given in the statement was produced.

Robert Beaty swore that the appellant went to New York in the spring after testator's death, and told him after his return that he had paid this note. He said that his uncle, the appellant, showed him the note, and that it appeared to have Hoople's name endorsed upon it. He also said that he last saw the note just before Mrs. Inglis was written to, in December, 1865.

The evidence of this witness is impugned, because he is now the husband of one of the persons beneficially entitled, and appears to have had a personal difficulty with his uncle some years since. His accuracy of recollection is certainly open to some question, for he affirms, and re-affirms, that

he made out the full statement showing the balance of £493 11s. 6d., in 1843, shortly after Armstrong died, which is manifestly incorrect, for it includes the valuation of the real estate, under date of May 6, 1844. It is also commented upon as singular that the only two notes he can mention as having been seen by him in the possession of the appellant are the note now in question and one called the "Hincks' note," which is material in another branch of the case. But after all, so far as his evidence proves the existence of a note drawn in favour of Hoople for that amount it agrees with the appellant's own statement, and the only difference between them is, that the one asserts and the other denies that it bore Hoople's endorsement. The assertion of Robert Beaty that it was endorsed with Hoople's name obviously involves the insinuation that it was concocted to defraud the persons interested in the Armstrong estate.

If it be necessary to express an opinion upon that point, I have no hesitation in saying that I do not think it is established that the note did purport to be endorsed by Hoople.

The next piece of documentary evidence is an account furnished by Hoople, from which it appears that the following remittances were received by him on account of the firm :—

November 21, 1842.....	\$999 17
“ 28, “	286 72
February 13, 1843.....	3,046 95

The result was, to leave a credit in favour of the firm on the last mentioned date of \$21, which on the 24th of April, 1843, was carried to the credit of Beaty, in whose individual name Hoople then opened an account.

The first point that arrests attention is, that all these payments were made during the lifetime of Armstrong, and that at his death Hoople was indebted to the firm in the sum of \$21. This is a very different state of affairs from that which the statement made by the appellant *primâ facie* indicates.

Hoople's statement calls upon the appellant to displace the strong presumption that the payments having been made during Armstrong's lifetime came out of the partnership funds. The explanation which might suggest itself, that a note or notes for £1,125 had been discounted by Hoople in the usual course, and that he had out of the proceeds met the partnership liabilities in New York, is not open, for the appellant expressly says that the note was never sent to Hoople, and indeed it plainly appears from the account that the moneys received by him were in the shape of drafts sent from Toronto. The appellant's claim now is, that these moneys were borrowed by him personally from Dr. Widmer, and afterwards repaid. The form in which it was brought into the Master's office is:—

1843. 15th May. Promissory note of the
late firm, or of James Beaty, to Dr. Wid-
mer, and now taken up by J. Beaty
personally \$4,500

The existence of such a transaction with Dr. Widmer depends for proof upon the appellant's own oath. In support of it no evidence, either documentary or verbal, is adduced.

No such note either of the firm or the appellant is produced. In such of Dr. Widmer's books as can be found there is no entry of any such transaction, although it is to be observed that his general books of that date seem to be lost. Mr. Beaty did not himself make any contemporaneous entry, which, even if inadmissible as evidence *per se*, might have served to refresh his memory. It would be quite opposed to well settled rules of law to hold that the mere oath of a person, who was at once executor and partner, however respectable his character, was satisfactory proof of a claim thus advanced.

Mr. Beaty was examined on various occasions during the progress of this litigation, and much stress was laid in argument upon the inconsistencies and discrepancies in his statements. It was answered that these discrepancies were no greater than might fairly be expected when a man was

speaking from memory, unrefreshed by writing, of transactions so distant in time, and that while he might be absolutely certain of the main point, namely, that he had paid these debts out of his own moneys, he might easily forget details as to the mode of payment. This may be so, and I confess that the inconsistencies do not seem to me to be so grave as they were represented; but it is quite obvious that they raise an additional barrier in the way of accepting as sufficient proof the executor's unsupported statement. He was first examined before the order was made. He then said that he thought paper A (the original statement) was the true account of the statement of the partnership affairs: that he had not the Hoople note, which is mentioned in it, so far as he knew: that he had had it looked for: that Hoople was the agent of the firm in New York, and notes for what they owed in New York were made payable in his office: that the amount, £1125, is what the firm owed in New York, payable through Hoople: that he remitted this amount to Hoople, as well as the amounts mentioned as paid for exchange: that the paper A shows the amount that Armstrong and Beaty *owed in New York at the time of Armstrong's death*: that he received the Hoople note from New York and had since seen it, but how many years ago he could not say: that he did not think it was ever discounted: that he had made up the amount due in New York from the invoices; and that he did not think he ever got back these invoices from the lawyer under whose instructions the statement of the affairs of the partnership was prepared.

Now granting Mr. Beaty to have been animated with the most scrupulous desire to disclose the entire truth, it is still manifest, when his present contention is regarded, that in giving that account he was not speaking from simple recollection.

I do not question his belief in the accuracy of his statement, but it certainly is not that which he would have made, if his subsequent contention had been present to his mind. The impression it would leave upon the hearer was

that the Hoople note had been sent to New York: that the whole amount of it was due in New York at the time of Armstrong's death, and that he subsequently remitted moneys, upon which the note was returned.

He does not make the slightest reference to his transaction with Dr. Widmer; nor does he appear to have then remembered that all the moneys were paid during Armstrong's life. He was afterwards examined in the Master's office on the 13th March, 1877, when he made a statement of which, I think, the following is a correct summary:

He did not go to New York in the fall of 1842, according to his custom, because Dr. Widmer told him that Armstrong could not recover from the illness which had seized him, and that it would not be prudent to leave. He said that he had some accounts to meet in New York, and the doctor offered to advance him money for that purpose. The amount of his indebtedness to Hoople and others at that time was £1125, for which he had drawn a note with the intention of taking it to New York and procuring it to be discounted through Hoople at the Leather Manufacturers' Bank. This note he never got discounted, as he got the money from Widmer, although not all at one time, but at different times, as he needed it to meet the claims, and he remitted to Hoople as money was required. He received from Dr. Widmer all the moneys stated in Hoople's account to have been remitted, and at the times there mentioned. At the time exhibit A was prepared he had in his hands the note made to Hoople, but not used, and that is the way it happens to be mentioned as it is in the exhibit. Upon the basis of this exhibit the division of the partnership estate was made.

On cross-examination, he explained that in November, 1842, he had drawn up a note at six months for the whole amount the firm owed Hoople and others in New York, but that he did not send it on, Dr. Widmer having offered to supply the necessary money: that he gave Widmer his own notes, but the money was remitted to New York for the firm's purposes: that to the best of his recollection he

gave his note to Widmer in May, 1843, after Armstrong's death. He also said: "It was after the date of the Hoople note that I had the conversation with Dr. Widmer, when he agreed to give me the money. Account exhibit 3 (or 4) was made up on the 20th of March, 1843. There was nothing due to Hoople from Armstrong & Beaty on 20th March, 1843. I had remitted the money; it was due to me from the firm, and I owed the money to Dr. Widmer. The £1125 is really what I paid for the firm. I owed the money to Dr. Widmer, and the firm owed it to me. The firm owed it to Dr. Widmer. Dr. Widmer held me responsible, and I charged the firm with it. * * When I got the moneys from Widmer I gave him due bills, but no note until May, 1843."

He was again examined on 22nd September, 1877, when he deposed: "I first began borrowing money from Dr. Widmer before Armstrong died—not much. He discounted a note for \$4500 to pay liabilities in New York. I got other moneys from him until finally I gave him the mortgage for £2000. I kept no record of the transactions with Dr. Widmer; it was always a note. I do not know if he kept books in these days or not. * * I put down in exhibit 3 the amount of liabilities to Hoople and others in New York. I did not put down in addition the note to Dr. Widmer, on which the money to pay them was obtained."

On cross-examination he said: "We owed \$4500, and I got the money from Dr. Widmer. I don't think I got it all in one sum. I gave him a note for the whole amount, and he gave me the amount in different sums, as I needed it, until the amount of the note was made up."

This account certainly seems to imply that he had discounted a note for £1,125 with Dr. Widmer, and received the proceeds in different sums, as he wished to remit. This does not entirely accord with his intermediate statement. The two combined do not give the same version as that which would naturally be gathered from his first examination. Without attaching undue weight to discrepancies, and

without adopting the minute criticism to which these statements were subjected with the view of making them appear irreconcilable, it is no injustice to Mr. Beaty to hold that they are inadequate to the task of reversing the onus under which he lies, of proving that the moneys which were presumptively paid by the firm belonged to him personally. There is no doubt that Mr. Beaty incurred obligations to Dr. Widmer, for which, on the 22nd of March, 1854, he gave him a mortgage for £2,000, but the interval of time between these two transactions is far too great to permit any inference to be drawn from one to the other.

I have by no means overlooked the circumstance that Mr. Beaty claimed that this was a liability of the firm immediately after his partner's decease, when, if he were really perpetrating a fraud, detection would have been easy. But so far as the evidence goes, he did not at that time mention Dr. Widmer in connection with the affair.

Robert Beaty swears that when he wrote out the statement, the appellant said this was a note the firm owed Hoople, that he had paid it at New York and brought it back with him; and that not a word was then said about Dr. Widmer. Mrs. Inglis, the respondent, swore that she first heard of any dealings between Dr. Widmer and the appellant from a copy of the accounts, and that before that he had always spoken of having paid Hoople, and had never spoken of Widmer. If the Master believed these witnesses, their evidence bore hardly against the appellant's view. When to this is added the consideration that Mr. Beaty had neglected the plain duty of keeping a record of these transactions, and of preserving the vouchers, which was very specially imposed upon him by his two-fold capacity of acknowledged trustee and alleged creditor, it is quite impossible to disturb the Master's finding on this point.

The next question arises with respect to the Trafalgar lot, on account of which the Master has charged the appellant with the sum of \$1,000. In dealing with this it

is to be remembered in the first place that the testator's will expressly declares this to be partnership property, and contains very precise directions to his executors with regard to the disposition to be made of it. If after accepting the trusts of the will, Mr. Beaty desires to contest the correctness of this statement, and to assert that the sole beneficial ownership belonged to him, it is the duty of the Court to exact from him proofs the most convincing and irrefragable.

He has given a statement which is not in itself improbable, and his implicit belief in which I do not feel disposed to doubt, but which is wholly uncorroborated. Indeed, a consideration of the evidence leads me to the conviction that after this lapse of time his memory cannot be relied upon as a safe guide. It is beyond all doubt that on the 13th June, 1842, this land was conveyed to Mr. Hincks by Armstrong in order to qualify him to sit as a member of Parliament.

The negotiations on the subject were wholly with Mr. Beaty, and there was no communication between Mr. Hincks and Armstrong. According to the recollection of Mr. Hincks, if he had been asked to whom the land belonged, he would have said to Mr. Beaty. He assumed that the land was Beaty's, because he never spoke to Armstrong on the subject. He gave Mr. Beaty a note for £500, which was to be returned to him upon his reconveying the land. In August, 1846, he conveyed the land to Beaty and received his note. He never paid or received any money. As he expresses it, he was just handing back the land.

These facts are now undisputed, yet the appellant's recollection of the occurrence had so far faded, that when he was first examined he declared that he never saw or heard of any note given by Mr. Hincks for the farm in Trafalgar. When first examined in the Master's office he said that Armstrong might have conveyed a lot to Mr. Hincks, but he did not recollect it: that he didn't remember Mr. Hincks giving Armstrong a note for £500, and that he himself never gave up to Mr. Hincks a note for £500.

After this it is impossible to act upon his unaided recollection of the circumstances connected with the original acquisition of this property, even if the law on grounds of public policy could have tolerated his attempt to controvert by his own testimony the specific allegations of the will. It was argued, however, that the Statute of Frauds is a protection against this demand. The train of reasoning on which this pretention rests is, that at the time of the testator's death the land was vested in Mr. Hincks without any enforceable trust: that he could not have been compelled to convey to any person: that of his own volition he conveyed to Beaty, not as trustee *nominatim*: that the conveyance was to Beaty singly, without joining his co-trustees; and that it is contrary to the statute to assert that the land was ever held in trust by any person after it had been conveyed by Armstrong.

I think it would not be difficult to expose the fallacy of this reasoning, but I do not think it necessary to pause for that purpose, because a sufficient answer is supplied by the fact that Mr. Beaty as executor held Mr. Hincks's note for £500, and that the return of this note was a condition of the conveyance being made. There is not the slightest reason to suppose that Mr. Hincks would have made the conveyance without this being either accounted for or returned. Granting that he might have chosen to refuse to reconvey the land, what is the consequence? He would have been compelled to pay the note. Either the note or land was an available asset of the estate. The one Mr. Beaty parted with; the other he got. The value of each, according to the Master, was just the same. It is, therefore, quite immaterial to the beneficiaries with which he is charged, and with one or the other he is beyond all doubt chargeable. Upon this point also the appellant fails.

The next ground of appeal is, that the Master erred in charging the appellant with annual rests, except upon the sum of \$2,000, which he admitted he had in his hands. Upon this question we have had the benefit of very full and able arguments, in which very different views of the

character, extent, and terms of the doctrine of the Court were presented for our consideration.

For the appellant it was contended that neither English nor Canadian precedent warranted this charge under the actual circumstances.

For the respondent it was strenuously urged that such charge was according to the well defined course of the Court; that it had become an established rule to charge compound interest, except where there was a mere neglect to invest; and that any interference with the finding would involve a disturbance of a rule of practice. If this be a correct description of the nature of the rule, we should hesitate very much before reviewing the decision of the Court below. It would be an extreme case which would induce us to attempt to control the Court in applying a mere rule of practice.

In view of this broad and, I think, novel contention, it is necessary to examine with some minuteness the course of decision upon the subject. We shall thus be enabled to form an opinion whether there is a fixed rule applicable to the case; and, if so, whether it is a mere rule of practice and what are its settled limits.

One of the earliest cases in which the liability of an executor to pay interest at a higher rate than the ordinary one of four per cent. was considered is *Forbes v. Ross*, 2 Cox 116. By the will the executors were directed to invest the residue in the purchase of lands, or upon heritable or personal securities, at such rate of interest as they should think reasonable. They lent money to one of themselves, a person of undoubted solvency, at 4 per cent., when 5 per cent. might have been realized out of heritable or government securities. The Lord Chancellor laid it down that the question whether an executor shall be charged with interest on the assets retained in his hands turns on this, namely, whether the fund has been so kept for any other purpose than that of discharging the growing claims upon it. He held that under the will in question the trustees were at liberty, using their discretion soundly and fairly

and honestly, to lend it to anybody that they might suppose would give a reasonable interest for it, considering at the same time the degree of responsibility of the person to whom it was lent; but that whenever a trustee contracts with himself he cannot spare himself. He used this language: "I proceed therefore on this single ground, that a trustee cannot bargain with himself so as to derive, through the medium of the contract, any degree of forbearance or advantage whatever to himself. And as it appears that 5 per cent. might have been made of the money by means pointed out in the will, I think Mr. Ross must be charged with interest on these several sums of money at 5 per cent."

That decision seems to have been an application of the rule that a trustee shall not profit by his trust.

In *Rocke v. Hart*, 11 Ves. 58, the attempt was made to charge interest at the rate of five per cent. against the assets of a deceased executor, on the ground that he had withheld money in his hands. He had gone to the East Indies, in 1787, without putting in his examination, being then in contempt, and he died in 1803. Sir Wm. Grant, M. R., said that he had looked into the cases upon the subject, and the result was that an executor is not charged with interest, except upon one of two grounds: either that he has made use of the money himself, or that he has neglected to lay it out for the benefit of the estate. He proceeds to remark, p. 60: "If the executor makes use of the money, he ought to pay the interest he made. He ought not to derive any advantage himself from the trust property. On the other hand an executor may be, and is frequently, charged with interest without any profit to himself. If his duty was to lay out and procure profit to the estate, and he has neglected to do so, it is reasonable that he should indemnify the estate against the effect of that negligence." He then points out that, in the absence of special circumstances, four per cent. is the rate fixed by the Court, but where the money has been employed in trade, the course is, to charge him five per cent.; if, however, there is nothing of employment, but mere neglect to pay, it is impossible to charge

him with more than four per cent. As there was nothing in the case to show that the fund was employed by the executor in any trade, or was employed at all, and only the negative fact that it was not brought in, he held that there was no ground to charge him with more interest than the general rate of the Court. It is to be observed that in neither of these cases was it contended that the accounts should be taken with rests; but they are of value as shewing the principles by which the Court is guided in dealing with executors retaining balances in their hands.

Raphael v. Boehm, 11 Ves. 92, came before Lord Eldon, upon exceptions to a Report, and the real question was the construction of the decree, and the proper mode of procedure in accordance with its terms. His Lordship, however, took occasion to consider the propriety of the decree, and he agreed that the defendant was rightly charged with compound interest, because there was an express direction in the will for the accumulation of the fund during the minority of the testator's children, and the rate of five per cent. was named. In such a case he thought that the Court would shamefully desert its duty to infants by adopting a rule that an executor might keep moneys in his own hands without being answerable as if he had accumulated. That decision is a capital illustration of the doctrine that if the will directs an investment of the trust fund, the neglect to comply with it will be deemed a positive breach of trust.

It is of interest to compare that case with *Mosley v. Ward*, 11 Ves. 581, before the same eminent Judge, reported in the same volume. The charge against the executor was, that he had dealt with the property of infants by unnecessarily calling in nearly the whole of it from good securities; and that he had done this for no purpose but that of keeping the money in his own hands. The money had been treated by him as part of his own general funds. The question was, whether he should be charged with interest, and it was held that he was chargeable at the rate, not of four per cent., but of five per cent.

In *Bruere v. Pemberton*, 12 Ves. 386, a new element was

introduced, which, so far as I have observed, did not exist in any preceding case, and which is invoked by the present appellant. A claim of one of the executors for commission had been disallowed on the ground that no charge on that account had been made during the lifetime of the testator. The effect of that was, to leave a large balance to be accounted for by the executor, and it was insisted that he should be charged with interest upon it since the death of the testator.

Lord Eldon held that he ought not to be charged. He observed, at p. 391, that, "It would be too severe to hold that an executor who has brought in his account, fairly making a claim that appears to him, and to the Court also, to be just but of which he cannot, from the evidence furnished by his own liberality in not making the charge during the life of the testator, avail himself, and the fund, though he considered it to be his own, proves by the judgment of the Court to be not his, but the testator's, and is ordered to be paid into Court, shall be in the same situation as if he had known it to be the testator's property, and had neglected his trust."

It is argued that even if the appellant has been unable, from lapse of time or from his own neglect in the preservation of testimony, to give strict legal proof of his claims, he nevertheless honestly believes in their validity. But, granting this honest belief, he does not bring himself within the principle of this decision, because it is impossible for the Court to say that he would have established his position if these questions had been agitated while the matter was still fresh. It may be that lapse of time has swept away his proofs, but it may be that they never existed.

The next case in point of time is, *Stacpoole v. Stacpoole*, 4 Dow 209, which was very aggravated in its circumstances. The suit was against an administrator, who had obtained letters in 1771, and made distribution to some extent, but had retained a large sum on pretences that were wholly without foundation. The suit was not brought until 1792, and was protracted in the Court below

until 1810. The judgment of the House of Lords was pronounced in 1816. The administrator was charged with interest, and annual rests were directed to be made, mainly on the ground that to his conduct were attributable all the embarrassments and delays in distribution. The judgment does not contain any discussion of the general principle upon which rests should be ordered. The point that was considered was, whether the executor was liable to pay interest, and in the judgment delivered by the Lord Chancellor there is no specific reference to rests; but it appears from the minutes of the order that the administrator was so charged. This decision must, I apprehend, be treated as depending upon its own peculiar circumstances, and cannot, in view of more recent cases, be deemed an authority for the proposition that mere delay in proceedings is a ground for charging interest.

In *Heathcote v. Hulme*, 1 J. & W. 122, before Sir Thomas Plumer, it appeared that the trust funds had been employed in trade by the administratrix. The intestate had died possessed of considerable capital engaged in a business that he had established. The administratrix believing that it would be beneficial to her children to carry on, instead of discontinuing, the trade, allowed the capital to remain so invested, and did continue the business. The Master of the Rolls held that the children were entitled to elect between the profits or interest at five per cent., but that they must take either one or the other for the whole period. He recognized as lying at the foundation of the rights of the parties the familiar principle, that when an executor or administrator has embarked the property of the deceased in trade, whether in his own or in any other, he cannot himself be permitted to derive any benefit from it. It was not contended that annual or any periodical rests should be made,

In *Crackelt v. Bethune*, 1 J. & W., 586, before the same learned Judge, the question was, whether the defendant should be charged with more than the ordinary rate of interest. He had been expressly directed by the will to

invest the personal property. He had, nevertheless, without necessity, sold out of the funds, and kept a large balance in his hands for years. The Court held that as the case was not one of mere negligence in not investing, but of gross breach of trust in having sold out the fund, the defendant was chargeable at the rate of five per cent., but refused to order rests. It does not appear from the report that the trust directed accumulation, or that the funds had been employed in trade.

Walker v. Woodward, 1 Russ. 107, which came before Lord Giffard, M. R., in 1826, is referred to by Mr. Lewin as the earliest reported case in which a trustee, who had used trust money in trade, appears to have been charged compound interest. The decision was founded upon an admission by the defendant in his answer that by carrying on business on a farm, and with stock belonging to the assets of an intestate, he had made considerable profits, but as he had not kept any separate account, and had blended the transactions of the farm with his other transactions he could not set forth the amount of the profits. There is no discussion of the general principle given in the report, but the short note is, that the Master of the Rolls was of opinion that the admissions in the answer entitled the plaintiffs to annual rests and five per cent. interest upon those rests.

In the same volume there is the case of *Sutton v. Sharp*, 1 Russ. 146, before the same learned Judge, which, although reported later, seems from the marginal note to have been decided a few months earlier. I confess that I do not perceive any satisfactory ground upon which it can be distinguished from *Walker v. Woodward*, 1 Russ. 107, except that the fund did not appear to have been directly employed in trade, yet the executor was only charged with simple interest at five per cent. The executor had paid the legacies, but had retained the residue. He acknowledged that he had paid the balances which remained in his hands into his bankers, whereby they became mixed, and blended with his own moneys. The learned Judge

said, at p. 151, "I consider it, therefore, as established doctrine that a party who, being a trader, and having of course an account with a banker, places trust moneys at his banker's in his own name, by that means increasing the balances in his favour, acquiring additional credit, and enjoying in his business the advantages naturally arising from that circumstance, must be considered as having employed the money for his own benefit. This executor is admitted at the bar to have been a trader; he acknowledges that he mixed the trust moneys with his own: it necessarily follows that he must be charged with interest at five per cent."

Three years later the question was raised before the Vice-Chancellor in the *Attorney-General v. Solly*, 2 Sim. 518, where the trustee of a charity had paid balances into a mercantile house, in which he was a partner. In arguing for the defendant, one of whose counsel was Sir Edward Sugden, it was stated that in *Walker v. Woodward*, 1 Russ. 107, the order for making rests was obtained by surprise. The Vice-Chancellor refused to direct the account to be taken with annual rests, but as the defendant had used the money in carrying on his trade, he charged him with interest at five per cent.

In *Carmichael v. Wilson*, 4 Bligh p. 145, the question did not come directly before the House of Lords. It seems to me that all that can be gathered from the decision is, that an executor who was in default under very special circumstances, having been ordered by the Lord Chancellor of Ireland to pay and be allowed interest on moneys in his hands, and payments to legatees, the decree was varied by directing that there should be a rest at the end of each year, and a balance struck, and interest charged upon that balance. It does not touch the question of the liability of a trustee, who has not been making payments from time to time.

In the celebrated case of *Docker v. Somes*, 2 M. & K. 655, Lord Brougham examined the question of the liability of a trustee who mixes trust moneys with his own, and employs both in a trade or venture of his own. It came before him upon an appeal from a decree of the Vice-Chancellor, who

had directed an enquiry as to the profits attributable to the trust funds. His Lordship said that there had been no previous decision allowing an account of profits, but that the cases by uniformly giving interest at different rates, and sometimes with rests, where the trust funds had been employed in the trustee's trade, would seem to acknowledge the principle that no account of actual profits should be given in such instances. But having regard to the principles that regulate the dealings of the Court with breaches of trust, he thought that they plainly led to the conclusion that the *cestui que trust*, if he chose, was entitled to insist upon a proportionate share of the profits, instead of interest. He rested this upon the broad foundation of the doctrine that whenever a trustee, or one standing in the relation of a trustee, violates his duty, and deals with the trust estate for his own behoof, the rule is, that he shall account to the *cestui que trust* for all the gain that he has made. He thought that the reason why the Court had not exactly followed up this rule in the case of trust moneys used in trade was, that the task of severing the profits attributable to them was difficult, and he seemed to concede that where serious difficulty arose in tracing and apportioning the profits a fixed rate of interest might be preferable; but he considered rests with compound interest much less advisable, generally speaking, than an account of actual profits.

This is a very strong authority, where there has been an employment of the subject of the trust in trade, but it is confined to that class of cases.

Several years after that judgment, Lord Langdale, when deciding *Mousley v. Carr*, 4 Beav. 49, seems to have considered the rule to be that if a trustee having trust money in his hands knowingly applies it to his own use, or in his trade, he is charged with interest at the rate of five per cent. As in that case the defendant was held not to have been bound to know that it was trust money which it was her duty to invest, she was charged four per cent. only.

In *Davenport v. Stafford*, 14 Beav. 319, which is relied upon by the present appellant, interest was not charged

against the defendant, but the circumstances were very peculiar. The defendant had never in fact received the moneys for which he was made accountable, but he had rendered himself liable by an admission of assets. It was hard enough that he should be strictly held to his admission. To have charged him with interest would have been grossly inequitable; but it is obviously distinguished from the present case by the circumstance that he never had the money.

In *Hutchins v. Hutchins*, 15 Jur. 869, the defendants had unreasonably doubted the identity of their *cestui que trust*, and had paid the fund to other persons. Knight Burns, V.C., characterized their conduct as a gross breach of trust, and directed annual rests to be made, but no attempt is made to elucidate general principles.

Willett v. Blanford, 1 Ha. 253, is well known for the elaborate discussion by Sir James Wigram of the position which a surviving partner and executor occupies when he carries on the partnership business without withdrawing from the concern the capital of the deceased. It is a clear authority for the general proposition that he is liable to account for profits, but its importance principally depends upon its analysis of the circumstances which affect the *quantum* of liability, and it has no direct bearing upon the question now under consideration.

In *Robinson v. Robinson*, 1 D. M. & G. 247, it was laid down as undoubted law that where trustees improperly retain balances in their hands, or by want of due care cause or permit trust money to be lost, they are chargeable with the sums so retained or lost, and with interest on them at four per cent. Further, that where the trustee has not only improperly retained balances, but has lent or used them in trade, the *cestui que trust* has the right, if it is for his interest to do so, to charge the trustee not with the sum retained and interest, but with all the profits made in the trade. Nothing is said in the judgment with respect to compounding interest or annual rests, nor was any reference to the subject necessary to the decision.

Much stress, therefore, cannot be laid for our immediate purpose upon the language of Lord Cranworth, which seems to point to a liability for simple interest only at five per cent., that being the ordinary rate paid on capital in trade.

In *Jones v. Foxall*, 15 Beav. 388, the Master of the Rolls formulated the doctrines of the Court in language, which I shall quote with some degree of fulness :—"Generally, it may be stated that if an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at four per cent. on these balances. * * If, in addition to this, he has employed the money so obtained by him in trade or speculation for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money or with interest at five per cent. per annum, and also with yearly rests, that is, with compound interest. * * In some cases the Court has charged the trustee with annual rests, because the trust under which he acted in distinct terms required him to accumulate the fund with compound interest ; in other cases the principle seems to have been that the Court visits the trustee or executor with an account in the nature of a penalty for his misconduct, where he has not merely committed a breach of trust, but where he has himself endeavoured to derive, or has actually obtained some pecuniary advantage from the use of the money of which he has thus obtained possession."

In that particular case it was the duty of the trustee to have invested, and he was charged with annual rests. It has been observed that if the money had been properly invested, it would have probably produced compound interest, as the dividends would have been reinvested. The trustee was doubly at fault, for he was not only guilty of a breach of trust in not investing according to the directions of the will, but he had used the money in his own trade.

In *Williams v. Powell*, 15 Beav. 461, the executor had ample funds in his hands, and there was no excuse for his

retaining the money, but instead of paying the legacies when the time for distribution arrived, and dividing the residue among the residuary legatees, he, being engaged in trade, paid the money into his bankers, and mixed it with his own money. The Master of the Rolls thought that he should be considered to have had the same benefit from it as if he had embarked it in trade, and he was accordingly charged with annual rests on the balance in his hands.

In *Knott v. Cottee*, 16 Beav. 77, there was an express trust for the investment of the money in certain securities, and for the accumulation at compound interest of the balances after the maintenance of the children. The trustee made investments in exchequer bills and foreign securities, which the Court declared to be improper. He was charged with interest at four per cent. only on balances, but annual rests were directed on the ground that there was an express trust for accumulation, of which he was aware when he retained the trust moneys. This seems to be a direct consequence of the application of the general principle that a trustee should be compelled to make good any loss to the estate directly resulting from a breach of trust.

The *Attorney-General v. Alford*, 4 D. M. & G. 843, was a case in which Vice-Chancellor Stuart had charged an executor, who had for several years held uninvested funds which he ought to have invested, with interest at five per cent., with annual rests. Upon appeal to the Lord Chancellor, it was held that he was only chargeable with simple interest at four per cent. His Lordship thought that there were two questions: first, one of fact, namely, what conclusion he was to come to relative to the conduct of the defendant; and secondly, one of principle, namely, what is the principle by which, in the case of executors and trustees having money in their hands which they ought to invest and do not invest, the Court is regulated in dealing with them in respect of interest, whether in charging them with four or five per cent. or with compound interest at five per cent., or under some circumstances in making them liable for the amount of consols which would have been forthcoming if they had invested the fund properly?

He laid it down that what the Court ought to do is, to charge the executor only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it. In his opinion, these are the only intelligible grounds for charging an executor with more interest than he has made. With regard to the effect of misconduct he used this language, at p. 852 : " Misconduct does not seem to me to warrant the conclusion that the executor did in point of fact receive, or is estopped from saying that he did not receive, the interest, or that he is to be charged with anything he did not receive, if it is not misconduct contributing to that particular result." As the circumstances did not lead to the conclusion that the defendant had made any profit by his misconduct, he was only charged with simple interest at the lower rate.

Lord Cranworth seems to have found it necessary to correct some misapprehension of his views, for in *Mayor of Berwick v. Murray*, 7 D. M. & G. 519, he explained that if it was supposed that he had laid it down in the *Attorney-General v. Alford*, 4 D. M. & G. 843, that a defaulting trustee could never be charged with more than four per cent., that was quite a mistaken assumption of his reasoning. He observed that in that case he thought that though the trustee was chargeable with impropriety of conduct, yet the circumstances shewed that it was impossible to impute to him an intention to appropriate the money to his own use. Where such an intention existed, he was clearly of opinion that the Court would be justified in dealing most rigorously, and charging the trustee with five per cent., whether he had made it or not.

In *Irwin v. Knox*, 8 Ir. Chy. R. 503, the question really turned upon the proper construction of a decretal order, but in the course of his judgment the Lord Chancellor refers with evident approval to the views which Lord Cranworth had expressed in the *Attorney-General v. Alford*, 4 D. M. & G. 843. He remarks that it is most just

that an executor should be put in the position of having to account for interest which he ought to have got, and that *Carmichael v. Wilson*, 4 Bligh 145, exactly carries out the same principles, for the effect of not charging the executor there would have been to enable him to put so much money into his own pocket. He proceeds to say, at p. 508, that the Court ought never to give any encouragement to the idea that that can be done ; that it ought to give the fullest and most liberal protection to executors performing their duty fairly, but must take care that they shall never be able to derive any profit from their own misconduct.

From this it is to be gathered that the learned Judge was of opinion that the principle upon which the Court proceeds is compounded of compensation to the *cestui que trust* and prevention of the executor profiting by any breach of his trust.

In *Townend v. Townend*, 1 Giff. 201, the question of the liability of the trustees arose upon a will, by which the testator had directed an infant's legacy to be invested in Government or real securities, or in shares in some railway company. At the time of his death the testator's estate mainly consisted of his share in a business, which had been carried on in partnership with his brothers, who were two of the executors, and in the business premises, part of which were freehold. The articles of partnership had provided that upon the death of any of the partners his share should be valued, and the amount of the valuation paid to his representatives within three years, for which payment security was to be given by the continuing partners upon a competent part of the partnership property. Instead of appropriating and investing the amount of the legacy in accordance with the directions of the will, one of the surviving partners and the third executor took a mortgage for the sum from the other partner upon a portion of the partnership estate. This was obviously equivalent to retaining the money in the business, and although the Vice-Chancellor acquitted them of any dishonest intent, he held them liable to account for the profits that had been realized.

He laid it down as a rule of the Court that trustees who are bound to invest will not be permitted to keep money in their own hands, and give security for it, but employ it in trade for their own profit. He declared that no matter what the security he may have given for it, if they keep it in their hands on security and use it in trade, it is in their hands trust money still, and for the profits they must account.

It is to be observed that the learned Vice-Chancellor admitted that he had, in the way of charging trustees with compound interest, gone further than some other Judges, but he thought that the difficulties attendant upon questions of making rests and charging compound interest do not occur in a case where the Court finds a trustee using for purposes of his own trade trust moneys which he ought otherwise to have invested. The will having directed interest to be accumulated from the testator's death, the executors were charged with annual rests up to the date of the security, which was given on the day when the amount of the testator's share in the partnership became payable under the articles, and were made liable for subsequent profits. Here, again, there was a union of the two ingredients, of neglect of a direction for accumulation, and employment of funds in the trustee's business.

Whether this decision in its entirety or some of the expressions attributed to the Vice-Chancellor are in harmony with the judgment of the House of Lords in *Vyse v. Foster*, 7 H. L. 318, to which I shall presently refer, it is not material at present to enquire.

In *Walrend v. Walrend*, 29 Beav. 586, the defendant was charged with compound interest. As administrator with the will annexed he had sold out stock specifically bequeathed to an infant, and had retained the produce in his hands even after an order for payment had been made in a suit of *Thellusson v. Walrend*. The reasons of the Master of the Rolls are not given in the brief report. It is to be noted that it was by a direct and positive breach of trust that he had obtained the money.

In *Saltmarsh v. Barrett*, 31 Peav. 349, the Master of the Rolls said, at p. 350 : " Every retention of money not required for the purposes of the estate is improper, but there are degrees of impropriety ; thus : If the assets are retained by the executor and invested in trade, the persons beneficially interested may either insist on having the profits made by such employment of the money, or interest at five per cent., with annual rests. The Court in such cases punishes the executor for his conduct. Where, however, property is simply retained, perhaps under a misapprehension, or upon a supposition that it would be speedily required, the executor is charged with four per cent. per annum upon the amount retained."

The point of adjudication in this case was, whether an executor who had paid money of the estate to a wrong person by mistake was chargeable with interest. It was held that he was not, the Master of the Rolls observing that the distinction lies between the two cases in which money is retained ; that in one case he has had the benefit of the money retained, and is liable to be charged with interest at four per cent. per annum ; but when money has been paid away under a mistake as to the legal right of the persons entitled, he cannot be charged with interest.

In *Blogg v. Johnson*, L. R. 2 Ch. 225, Lord Chelmsford, C., stated it as a principle of equity that where an executor or trustee unnecessarily retains money in his hands which he ought either to have invested or to have paid over to the person entitled to it, he will be made to pay interest for it. Where money is thus improperly retained, he was of opinion that it is immaterial how the sum has arisen, whether from a legacy, or a distributive share, or a residue, or the arrears of income. He said : " The plaintiff's case amounts to this : that the result of the accounting in the suit has been to ascertain that a sum of £4380 16s. 1d. was due from the defendant, as executor, at the death of Mary Johnson : that that sum must therefore be treated as if it had been in the defendant's hands from that time, and so retrospectively to have been improperly retained from that

period instead of being paid over to the plaintiff." Being of opinion that the mere omission to account will not make a person liable as if he had accounted, and till the account there was no certain sum which the defendant was bound to pay, he held that the defendant was only liable for interest from the date of the certificate.

But when properly considered I do not think that this case assists the appellant. The defendant was the executor of his brother, who had bequeathed all his residuary estate to him in trust to pay the income to the widow during her life. He and his brother had been in partnership as dealers in stone, and there were large assets and liabilities. The defendant had never accounted to the widow, although she had made frequent applications to him, but he had paid her a fixed annual sum. After her death her executor filed a bill for an account, in which suit the defendant was found liable for a large sum. But until the preliminary decree no principle had been settled upon which the accounts should be taken; and it is therefore easy to understand why interest should not be charged upon the amount for which the defendant was ultimately made liable, until that amount was fixed by the Master.

That decision in fact proceeded upon the same principles as, in *Turner v. Burkinshaw*, L. R. 2 Ch. 488, led the same learned Judge to refuse to charge interest against an agent simply because he had not accounted. The plaintiff had implicit confidence in the defendant, made him in a certain sense his banker, and left him in the uncontrolled management of his affairs. It was held that while such an agent is undoubtedly bound to account whenever his principal calls upon him to do so, he is not liable to the penalty of paying interest unless he has improperly withheld accounts, and refused to pay over money in his hands when demanded, or has delivered fraudulent accounts.

In *Burdick v. Garrick*, L. R. 5 Ch. 233, Lord Hatherley approved of the principle laid down, in *Attorney-General v. Alford*, 4 D. M. & G., 843, namely, that the Court does not proceed against an accounting party by way of punishing.

him for making use of the plaintiff's money by directing rests or payment of compound interest, but proceeds upon this principle, either that he has made, or has put himself into such a position that he is to be presumed to have made five per cent., or compound interest, as the case may be. If the money received has been invested in an ordinary trade, the whole course of decision, in the opinion of that very experienced Judge, tends to this, that the Court presumes that the party against whom relief is sought has made that amount of profit which persons ordinarily do make in trade, and in these cases the Court directs rests to be made.

Lord Justice Giffard, said, that "The question of interest clearly depends upon the amount which the person who has improperly applied the money may be fairly presumed to have made."

In the very recent case of *Vyse v. Foster*, L. R. 8 Ch. 309, the testator was a partner under articles, by which on the death of any partner his share was to be taken by the surviving partners at a price to be ascertained from the last stock taking, and to be paid by instalments extending over two years, with interest at five per cent. per annum from his death. He appointed one of his co-partners an executor. The value of the testator's share was ascertained, but not paid. Successive partnerships were formed, and they charged themselves in their own accounts with interest on this value at five per cent. and annual rests. The plaintiff's contention was, that she was entitled to participate in the profits made by the successive firms. Bacon, V. C., made a decree in his favour upon this point, which was reversed by the Lords Justices. In delivering the considered judgment of the Court Sir Wm. James, said, at p. 333, "It was pointed out by Lord Cranworth, in *Attorney General v. Alford*, that this Court has no jurisdiction in this class of cases to punish an executor for misconduct by making him account for more than that which he actually received, or which it presumes he did receive, or ought to have received. This Court is not a court of penal jurisdiction. It compels restitution of property unconscientiously withheld; it gives full compensation for any loss or damage

through failure of some equitable duty ; but it has no power of punishing any one. In fact, it is not by way of punishment that the Court ever charges a trustee with more than he actually received, or ought to have received, *and the appropriate interest thereon*. It is simply on the ground that the Court finds that he actually made more, constituting moneys in his hands, 'had and received to the use' of the *cestui que trust*." He also took notice of the circumstance that the plaintiff had delayed filing her bill for four years after she had become of age, when she might have called upon her trustees to act.

Now, through this long line of cases, I think the great principles which the Court has on the whole endeavoured to enforce are, on the one hand, that of restoring to the *cestui que trust* his own, and of fairly compensating him for loss directly attributable to the neglect or breach of duty by the trustee ; and, on the other hand, that of withdrawing from the trustee any advantage he has appropriated by abusing his position.

The penal doctrine, to which a certain degree of prominence is given in some of the cases, although, so far as I perceive, it was not necessary to their decision, can hardly be supported in face of the views expressed by Lord Cranworth, Lord Hatherley, and Lords Justices James and Giffard.

In *Wiard v. Gable*, 8 Gr. 458, the late Vice-Chancellor Esten was of opinion that compound interest should be charged where there was a breach of trust by the trustee, or an application of the trust moneys to his own use. His course of reasoning was that, according to English rule, where either one or the other of these things was attributable to an executor or trustee, he was charged the additional rate of interest ; but in this country there are not separate rates of interest applicable to different cases ; and as a trustee guilty of mere negligence will be charged with interest at six per cent., and as he ought to be visited with a severer penalty when he has committed a breach of trust, or has applied the moneys with which he has been entrusted to his

own use, the only available penalty should be inflicted upon him by making him pay compound interest. The result of the views he entertained is apparent from the following passage, p. 459, "The £350 received from Gordon and the surplus rents ought undoubtedly to have been invested; but if the defendant had simply neglected this plain duty, I should have charged him only with interest at six per cent. It is not pretended, however, that he retained these moneys in his own hands wholly unproductive; it is plain that he applied them to his own use, and I think, therefore, that he ought to be charged with compound interest; in other words, that if the parties claim it, the account should be taken against him with annual rests."

In *Smith v. Roe*, 11 Gr. 312, the same learned Judge had occasion to consider the question. He said that "The wholesome rule seems to be established by the more modern authorities, that an executor or trustee shall be charged with what he ought to have made, with what he actually did make, or with what he must be presumed to have made." The executors whose duty it was to invest had retained the moneys in their own hands, and applied them to their own use, giving security. The Vice-Chancellor thought it was reasonable to hold that they stood in the same position as trustees who use the trust moneys in their trade, and who are conclusively presumed to make compound interest. This decision was reheard before the full Court, and the report states that the order was varied by striking out the clause as to annual rests, it appearing that such interest as had been paid had been paid annually.

In *Small v. Eccles*, 12 Grant 41, Vice-Chancellor Mowat thought that the lowest rate being six per cent., with rests, it is obvious that we ought to charge a trustee something more, when his conduct would in England have subjected him to a charge of five per cent. The suit was against the personal representative of a deceased trustee who, six years before his death, had received a large sum of money which he should have immediately paid over. He rendered no account for some years of his dealings as trustee, and then rendered an

account claiming that he had no trust moneys in his hands. The accountant had charged him with compound interest at six per cent., which was equal to about seven per cent. for the period in question. The learned Judge was of opinion that such a case would not in England be regarded as one for the lowest rate of interest, and that the defendant could not therefore justly complain under the circumstances that the accountant had selected, as the increased rate, six per cent. with rests. This judgment is also valuable as containing a succinct and clear statement of the reasons for, and the extent of the applicability of the English rules in this Province. The learned Judge remarked that not paying over is treated as a greater wrong than a mere omission to invest. He did not, I apprehend, intend to lay this down as an absolute and unqualified proposition, for other passages in the judgment show that he fully appreciated the fact that under certain circumstances it might be a smaller wrong. His language was, no doubt, meant to apply to the cases he had been discussing in the context. The whole of the reasoning in this judgment is extremely cogent to show that where more than four per cent. is charged in England, something beyond six per cent. is charged here, but it does not support the contention that the allowance of annual rests is necessarily the proper course. On the contrary, it points to the conclusion that while previous to 1858 that was the only mode in which the additional rate sanctioned by English precedent could be charged, the abolition of the laws against usury in that year had rendered it unnecessary to resort to that expedient.

The next case was *Wightman v. Helliwell*, 13 Gr. 330, in which the late Chancellor VanKoughnet seems to me to have expounded with admirable clearness and precision the rules by which the Court should be governed. In one pregnant sentence he compresses the essence of the authorities, p. 344, "The principle and the object in every case is to make good the loss caused by the acts of omission or commission of the trustee, or to wrest from him any benefit he has, or is taken to have, derived from the use of the trust moneys."

Again he observes, at p. 345, "Compound interest may in some instances, in such a case as the present, be a convenient mode of making this compensation, as in *Small v. Eccles*, 12 Grant 41, (in which, however, as I understand, the defaulting trustee was, as to the matters in question, a trader), but in other cases it may be oppressive, and sound more as punishment than compensation."

He adds observations, which are not without their pertinence here, in regard to the duty of persons interested paying attention to the management of the trust, and coming promptly to the Court.

Mr. Lewin's book has become such a classic upon this subject that I may well add his opinion to the authorities. It is, that an executor will be charged with the higher rate of interest when he is guilty, not merely of negligence, but of actual corruption or misfeasance amounting to a wilful breach of trust.

The cases I have cited from our own Court effectually dispose of the contention that the charge of compound interest depends upon a mere rule of practice. The Court is to be governed by the English decisions, with due regard to the circumstances of the country. The rule is one of law, as contradistinguished from one of practice, just as much as is the principle upon which damages should be assessed in an action at common law; and if we differ from the Court below, we are not assuming to interfere with a decision upon a mere point of practice.

The question then is, upon the principles properly deducible from the authorities, what should be our judgment upon the liability of the appellant to be charged with compound interest. I can sincerely say that it is not without the most anxious consideration, and the greatest distrust in the first instance of the correctness of my own opinion, that I feel compelled to differ from that of the learned Vice-Chancellor. But the more I have reflected upon the case, the more strongly have I become convinced that it is not one in which this confessedly severe rule should be applied. I cannot think that it is even a case for charging a higher rate of

interest than six per cent., which the late cases in our own Court shew is the utmost limit of the appellant's liability.

When Mrs. Carroll died, all the active duties of the appellant as trustee terminated. He was not bound—he was not entitled—to invest the money he held for the respondent and those in the same interest. His sole duty was to pay each of them a sum of money. He promptly informed the respondent that he was prepared to pay her share, and asked her to take the necessary steps to receive it, and give him a discharge. His explicit request was, that she should present herself to receive the moneys coming to her under the will. He did not state the amount to which he admitted her to be entitled, but he had previously informed her of what in his view he held as trustee. This letter was at least an invitation to her to examine and discuss the position he had already asserted. For twenty-five years he had been paying her mother interest upon the assertion of its correctness. The respondent had many years before her mother's death been fully cognizant of his claims. She had been informed some time before his mother's death of the exact position of the transaction with which Hoople's name was connected. Her rights in the Trafalgar lot were apparent on the face of the will, and she was aware of the appellant's contention that he was not liable to account for its proceeds. In short, it is beyond doubt that she knew the nature and extent of the appellant's claims at the time she received the invitation to present herself to receive her share. He is not proved to have been a trader since that date, or to have used the trust moneys in business. In fact he had always considered these moneys as his own, and had acted upon that supposition without objection from the respondent, his mother, or any of those interested under the will.

The items with which he is charged do not strictly bear the character of trust moneys received by a trustee. As to the Hoople transaction, he has simply failed to prove a payment which he claimed to have made on behalf of the partnership. He assumed the estate at a valuation upon the basis of his right to this allowance. He has shewn that he

failed to collect many of the debts, and it is possible, as suggested, that he would not have taken the partnership estate, but would have allowed it to be wound up in the ordinary way, if he had not believed that his right to this credit would not have been disputed. As to the Trafalgar lot, there is much force in the observation that the gist of the default with which he is chargeable is that of neglecting to collect the note of Sir Francis Hincks. If there had been no such note, and Sir Francis had chosen to convey the land to the appellant absolutely, it is questionable whether he could not have held it against the respondent.

As to the George street lot, as I understand his evidence, it is that he never used the proceeds for his own benefit, but paid them into the Bank of Upper Canada on account of an association for whom, in his view, he held the land upon trust.

The appellant had advanced his claims openly ; and although he has now failed to establish them by legal proof, I do not feel inclined to hold that they were advanced fraudulently, or otherwise than unsuccessfully.

Upon this state of facts I am unable to perceive that his fault is more aggravated than that of a debtor who has failed to make payment. If he had acknowledged his liability so that he might have been sued at law, he would only have been charged with six per cent. Why should he be liable for a higher rate when his attitude was well known and his claims disclosed ?

The authorities, our own as well as the English, shew that the rule for the guidance of the Court rests upon the basis of compensating the *cestui que trust*, and depriving the trustee of advantages he has wrongfully obtained. It is an erroneous assumption that, at least since 1858, the Court has been bound to charge either six per cent. simple interest, or six per cent. compounded, according to circumstances. The charge of compound interest is in some cases the appropriate remedy, as for example, where there has been an inexcusable neglect of an express direction for accumulation. Mr. Cassels endeavoured to avoid the effect of the arguments

tending to shew that upon the facts of this case neither upon English precedent, nor according to the rules laid down in *Wightman v. Helliwell*, 13 Gr. 330, was the compounding of interest the appropriate course, by the contention that it was, at any rate, a case for a higher rate than six per cent., and that the charge made was equal to about eight per cent. for the same period. But the Master did not deal with the matter as one of compensation, and we do not feel inclined to remit the matter to him for further consideration in that view. Our opinion is that, having regard to the circumstances I have mentioned, and more especially to the length of time during which the appellant was allowed by other parties to believe that the moneys he is now compelled to pay were his own, and to the unexplained delay in commencing the proceedings, full justice is done by simply holding that it was erroneous to compound the interest. That leaves the appellant chargeable with simple interest at six per cent., the amount of which will be calculated by the Registrar, and inserted in the certificate.

As we intimated upon the argument, it is quite clear that the appellant is entitled to an allowance by way of commission.

Upon these two grounds the appeal is allowed, with costs, and upon the other grounds dismissed, with costs.

O'CONNOR ET AL. V. BEATTY.

Deed—Investigation of title—Dower.

On a sale of land, the deed and mortgage back were executed by the vendor and purchaser, and left with an attorney until their respective wives should come in and bar their dower; but nothing was said as to title. The defendant went into possession of the land, improved it, and made a payment on the mortgage, but raised no objection to the title until he discovered, upon endeavouring to raise money on the land four years after he had gone into possession, that there was a mortgage on it sixteen years old, which had not been foreclosed.

Held, varying the judgment of the Common Pleas, 27 C. P. 203, though upon a ground not taken there, that the defendant was entitled to have a release of the dower; but that he had waived his right to have an unlimited inquiry as to title.

THIS was an appeal from a judgment of the Common Pleas discharging a rule *nisi* to set aside a verdict for the plaintiffs, and to enter a verdict for the defendant, reported 27 C. P. 203. The pleadings and facts are fully stated there, and in the judgment on this appeal.

McCarthy, Q.C., for the appellant. The evidence shews that the deeds were delivered in escrow until the dowers should be barred, as it clearly appears that they were left with Kelly for that express purpose. No particular form of words is necessary to constitute such a conditional delivery, but the intention of the parties may be shewn by the facts and surrounding circumstances: *Bowker v. Burdekin*, 11 M. & W. 147; *Millership v. Brookes*, 5 H. & N. 797; *Trust and Loan Company v. Covert*, 32 U. C. R. 222; *Furness v. Meek*, 27 L. J. Ex. 34; *Xenos v. Wickham*, 13 C. B. N. S. 391, L. R. 2 H. L. 296; *Gillatley v. White*, 18 Gr. 1. Proof of actual delivery is necessary where the delivery is not to the grantee, but to a third person, as it was in this case: *Co. Lit.*, 36 *a*; *Watkins v. Nash*, L. R. 20 Eq. 262; *Doe Garmons v. Knight*, 5 B. & C. 688. It is not reasonable to suppose that the appellant would have accepted delivery without the dower being barred; and *Thornhill v. Jones*, 12 U. C. R. 231, and *Wilson v. Biggar*, 26 U. C. R. 85, shew that if the delivery was

complete we would be without remedy, as an inchoate right to dower is not a breach of any of the covenants. We are entitled in equity to have the dower barred; and the title would not be forced on us if we did not choose to accept compensation: *Vanorman v. Beaupre*, 5 Gr. 599; *Gamble v. Gummerson*, 9 Gr. 193. The possession by the appellant cannot be held to be evidence that the estate passed, as he was in possession at the time of the agreement for the purchase, and his continuance in possession must be considered as in pursuance of the contract of purchase. Under such circumstances, his possession was not a waiver of his right to call for a good title: *Simpson v. Sadd*, 4 DeG. M. & G. 665; *Bown v. Stenson*, 24 Beav. 631; *Kilborn v. Workman*, 9 Gr. 255; *Gordon v. Harnden*, 18 Gr. 231; *Jones v. Clifford*, L. R. 3 Chy. Div. 779; *Harnett v. Baker*, L. R. 20 Eq. 50; *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *Hook v. McQueen*, 2 Gr. 490; *Darby v. Greenlees*, 11 Gr. 351. Then the payment of purchase money, which was endorsed on the mortgage, is relied on; but it proves nothing, as the endorsement was not made by the appellant, nor was it known to him, and the payment was not made in accordance with the time mentioned in the mortgage. It was merely a payment on account of the purchase money. The learned Judge, who delivered the judgment of the Court below, is in error in saying that the appellant used the deed to raise money upon the title as his own, as it was proved that he never had the deed. He only tried to raise money on the land to pay for it; and if the matter was *in fieri* that cannot be held evidence of a delivery: *Mitcheltree v. Irwin*, 13 Gr. 537; *Bingham v. Bingham*, 1 Ves. Sen. 126; *Burroughs v. Oakley*, 3 Swanst. 159.

Lount, Q.C., for the respondents. The only incumbrance on the property was a mortgage sixteen years old, and the inference is that Beatty knew of this, but considered that it would never be enforced. He was bound to know of this mortgage, in consequence of its being registered, and must be taken to have waived any objection to it. But at any rate, he is estopped by his subsequent conduct

from demanding an investigation of title: *Commercial Bank v. McConnell*, 7 Gr. 323; *Leslie v. Preston*, 7 Gr. 434; *Rae v. Geddes*, 18 Gr. 217; *Sibbald v. Lowrie*, 18 Jur. 141; *Wallace v. Woodyear*, 2 Jur. N. S. 179; *Port of London Assurance Co.'s Case*, 5 DeG. M. & G. 465. It is true that the deeds were left with Kelly for the wives to execute, but the delivery was complete and the transaction was concluded when the appellant and McFarlane had signed them. The only evidence to prove that they were delivered on any condition was the uncorroborated testimony of the appellant; and the learned Judge having found in favour of the respondents, his finding should not be disturbed unless it appears to be manifestly wrong: *Scott v. Dent*, 38 U. C. R. 34. All the facts shew that the appellant considered the matter closed, and that he accepted the title. He continued in possession for years, not under the agreement, but under the deed; he made improvements on the land, making no complaint as to title until he tried to borrow money on the land as his own in 1872, when he for the first time discovered the mortgage: *Young v. Hubbs*, 15 U. C. R. 250; *Henderson v. Vermilyea*, 27 U. C. R. 554; *Trust and Loan Company v. Covert*, 32 U. C. R. 222; *Lloyd v. Bennet*, 8 C. & P. 124. It is indisputable that the payment of \$200 was on the mortgage. The right to dower is only a ground for compensation, and not an objection to title, and the appellant has a complete remedy on the covenants in the deed in case dower should ever be obtained. It may never be asked, and in this case the respondents at the trial offered to execute a release of dower.

March 4th, 1878 (a). Moss, C. J. A.—This is an appeal from a decision of the Court of Common Pleas, sustaining a verdict for the plaintiff in an action of ejectment, brought for default in payment of a mortgage made on the 4th April, 1868, by the defendant to one McFarlane, since deceased, under whose will the plaintiffs claim.

(a) *Present*.—MOSS, C.J.A.; BURTON, PATTERSON, and MORRISON, J.J.A.

The questions for adjudication arise upon an equitable plea, which is constructed upon the model of a bill by a purchaser for specific performance. It sets up a verbal agreement between the defendant and McFarlane for the purchase of the premises at the price of \$1,000, of which \$400 was to be paid in cash, and \$600 to be secured by a mortgage upon the premises. It alleges that McFarlane agreed to execute and deliver to the defendant a good and sufficient deed in fee simple, free from incumbrances and from his wife's inchoate claim of dower; and that in pursuance of the verbal agreement, the conveyance and mortgage were executed by McFarlane and the plaintiff, and deposited with one Kelly to hold until they were executed by their respective wives, and until McFarlane should procure the removal of certain incumbrances and otherwise complete his title to the premises. It further alleged that possession was taken by the defendant pending the fulfilment of this agreement, and that he had made large and valuable improvements; that McFarlane had not procured a release of his wife's dower or the removal of the incumbrances, nor completed the title, but on 13th December, 1873, without the knowledge of the defendant, had caused the deed and mortgage to be registered: that the defendant has paid \$600, and has been ready and willing to pay the balance upon the performance of the agreement for purchase: that under the circumstances the deed and mortgage had never been perfectly executed: and that the verbal agreement has been partly performed so as to entitle the plaintiff to specific performance, for which it prays.

The question principally debated before the Chief Justice of the Common Pleas, who tried the cause, seems to have been whether the execution of the mortgage had been completed by delivery. He found that there was no condition attached to the delivery of the deed to prevent the whole estate of McFarlane passing to the defendant: that there was no delivery in *escrow*: that the deeds were left with Kelly, and that the wives were to come in and execute; that defendant remained for years in possession

under the deed, and tried to raise money on the land; that defects were proved in the title, and when discovered McFarlane promised to set all right.

It is plain from the evidence that the only reason for leaving the deeds with Kelly was that they might be subsequently executed by the wives, who were not then present. No attempt is made to explain their non-execution by the wives. But even if the finding of the Chief Justice had not been specific, the conclusion is inevitable that they were deposited with Kelly for the sole purpose of being executed by them. Kelly's evidence upon that point is free from ambiguity, and although the defendant swore that, as he thought, Kelly was to keep them until it was found if there was anything against the title, he did not assert that there was any agreement to that effect. On the contrary he stated that nothing was then said as to the title. His statement was without corroboration, and the Chief Justice preferred Kelly's version. Indeed the other facts proved by the defendant himself shew that the deeds would not have been left with Kelly if they had been executed by the wives. It was not until four years afterward that any question was suggested about the title, when, upon the occasion of defendant endeavouring to borrow money on the premises for the specific purpose of paying off McFarlane, it was discovered from the Registrar's abstract that McFarlane had in 1854 conveyed to one Delany, who had given a mortgage to secure part of the purchase money, which had not been foreclosed.

Upon the evidence and the finding of the learned Judge it was impossible for the defendant's counsel to contend that the leaving of the deeds with Kelly had any reference to questions of title, but he urged that the deeds were in *escrow* until the wives should sign, and have never operated as conveyances, in consequence of which the defendant is to be treated as in possession simply under the contract of purchase, and as having still the right to insist upon an investigation of title, and upon a good title being made. I do not think that the defendant's rights go to that extent.

He had previously been in possession of the premises as tenant, and the evidence puts it beyond any doubt that he remained in possession and made his improvements, not pending any investigation of title, but because the deed had been made, and because he considered its effect was to make the land his property.

It was attempted to destroy the effect of the fact that the defendant had tried to raise money by a fresh mortgage of the land, by suggesting that he simply thought of himself as owner under the contract, and not by reason of the deed. This theory is opposed to common experience. Persons in the position of life of the defendant, do not rest their belief of ownership upon a contract of purchase, but, on the contrary, are apt to attach an excessive value to the possession of a deed. It was also argued that the subsequent payments made by the defendant were not made in terms of the mortgage, and ought to be considered as made upon the footing of the verbal contract. This contention is without support upon the evidence. The verbal contract contemplated a mortgage and payment in accordance with its conditions. The payments, which the instrument signed by the defendant secured, were yearly payments of \$100 each on 1st March, 1869, and the following years. The endorsement is for \$200, and is dated 11th July, 1871, before which time these instalments should have been paid; but it only purports to be a memorandum of payments previous to that day, and it is not shewn at what times or in what sums the money was paid. I agree with what I understand to have been the opinion of the Court of Common Pleas, that the only inference deducible from these facts is, that the payments were made upon the mortgage.

I do not think it at all necessary to examine the learning upon the conditions under which an instrument is to be deemed an *escrow*. In favour of the defendant, it may be assumed that the question comes before us precisely as if he had filed a bill for specific performance. If the controversy between the parties had assumed that form, I think he would not have been held entitled to a general

investigation of the title. The cases cited on his behalf, instead of supporting, are opposed to his contention. For example, in *Simpson v. Sadd*, 4 D. M. & G. 665, the Lord Chancellor had recognized the correctness of the argument advanced for the plaintiff, that taking possession was an equivocal act not necessarily amounting to a waiver of the right to call for a title. But it was held that acts by the defendant, in themselves far slighter assertions of ownership than those of the defendant here, were inconsistent with an intention to call for the title. Lord Cranworth said that the result was to produce the irresistible conclusion that the defendant never meant to ask for more than a lease without calling for the plaintiff's title. The evidence was certainly not more cogent to establish this conclusion, than is the proof in the present case, that the defendant never intended to ask for more than a bar of dower by McFarlane's wife.

The case of *Bown v. Stinson*, 24 Beav. 631, was referred to as authority for the proposition that if the transaction was still to be deemed *in fieri*, the defendant was free to take any objections to the title. The sale there in question had been made on the 2nd of January, 1857, and an abstract delivered on the 23rd of February. The vendor's solicitor had frequently demanded the draft conveyance during March and April, but it had not been sent. Possession had been taken by the purchaser on the 7th of April, but as the Court determined not under the conditions of sale. In reply to a demand for payment, the purchaser without raising any objection to the title shewn by the abstract had expressed an expectation of being prepared to pay a certain sum at a time named. The Master of the Rolls held that he was precluded from raising any objection to the title upon grounds suggested by the abstract, but he intimated that if it had been shewn that there were defects that had not been then disclosed he would not have precluded him from enquiring into these. This case lends no aid to the defendant. In this country, as has been more than once pointed out by the Judges of the Court of Chancery,

the purchaser does not act upon a regular abstract furnished by the vendor's solicitor. The record in the Registry office is the source to which he looks for information as to the title. In this case the defendant must be taken either to have been satisfied with what the register disclosed, or to have chosen to refrain from examining it. He has not by evidence shewn himself to be entitled to any better position than a purchaser in England to whom an abstract containing all the particulars appearing on the register had been delivered, and who had, without raising objections to the title it disclosed, remained so long in possession, and exercised such decided acts of ownership over the land. This judgment itself clearly states the reasons against permitting a purchaser in possession to avail himself of such objections, unless taken with reasonable promptitude.

The decisions in *Harnett v. Baker*, L. R. 20 Eq. 50, and *Jones v. Clifford*, L. R. 3 Ch. D. 779, however interesting and important in themselves, may be dismissed with the single observation that they relate to the consequences flowing from special conditions in an agreement for sale, and that there were no special conditions in this case.

The judgment in *Gordon v. Harnden*, 18 Gr. 231, upon which reliance was placed, lends no countenance to the defendant's contention. There the purchaser had before demanding an abstract exercised acts of ownership over the land. But it was properly held that if these acts would have amounted to a waiver of the right to call for a title, their effect was removed by a subsequent delivery of an abstract in pursuance of the purchaser's request, and that the purchaser was entitled to have the abstract verified. This abstract was the ordinary certificate furnished by the registrar, and the purchaser was declared to have accepted the title as therein set forth, subject to verification. I think there is great good sense and sound principle in the judgment in *Commercial Bank v. McConnell*, 7 Gr. 323. After an examination of the decisions in England the present Chancellor said: "If a purchaser choose to

assume the title to be good, or act upon his own knowledge or opinion without seeing, and without asking to see how the title is made out by the vendor, I should think he would be bound by such acts as are shewn in this case; and I say this, having in view the circumstances of this country, the comparative simplicity of titles, and the absence in very many cases of the formalities which attend the transfer of property in England." To every word of this opinion I subscribe my assent, and I think it conclusively disposes of the defendant's right to demand an unlimited enquiry as to title.

But the question of dower stands upon a different footing. It is perfectly certain that there was no agreement to pay \$1,000 for the land unless the dower was barred, and that right the defendant has never waived. He is therefore entitled in equity to a release from McFarlane's widow, or to protection from the assertion of her right. This position does not appear to have been advanced in the Court below, as the nature of the relief to which the defendant was entitled.

From the judgment there delivered, the contest would seem to have been confined to the legal operation of the deed. This equitable right, however, is, although perhaps not very distinctly, asserted by the plea, and is made a ground of appeal. If the defendant had restricted his opposition to the plaintiffs' claim to recover possession to the assertion of this right, there would have been good equitable grounds for restraining the action until the release had been given, or proper terms had been settled. He could not in equity have been bound to pay the balance of the purchase money unconditionally. But the defendant, who still owes more than a third part of the purchase money, has chosen, upon grounds which have proved untenable, absolutely to dispute the plaintiffs' right to possession. This course, while not disentitling him to the release, or to protection against the assertion of the widow's right to dower, must fix him with the costs of this litigation.

The recent authorities have settled the rule to be followed when the wife of a vendor refuses to bar her dower.

The judgment of the Court therefore, is, that upon the defendant paying to the plaintiffs the costs in the Court below, and the costs of this appeal, and paying into the Court of Common Pleas the amount due upon the mortgage, all proceedings in this action shall be stayed; that upon the plaintiffs producing to the proper officer of that Court, for delivery to the defendant, a sufficient release from McFarlane's wife, they shall be entitled to receive such moneys; and that in default of such payment within two months, the appeal shall be dismissed, with costs.

BURTON, PATTERSON, and MORRISON, J J.A., concurred.

ROGERS V. HASSARD.

Malicious prosecution—Unauthorized insertion of word “feloniously” in information.

In laying an information against the plaintiff, the defendant only intended to charge him with having unlawfully carried away a saw, and stated facts to the magistrate which merely amounted to a charge of trespass, but in drawing the information the magistrate of his own accord used the word “feloniously,” which word the defendant did not know the meaning of.

Held, reversing the decision of the County Court, that under these circumstances an action for malicious prosecution would not lie.

Remarks as to the proper course to pursue in drawing an information.

This was an appeal from a judgment of the County Court of the County of Wellington.

The declaration charged that the defendant, falsely and maliciously, and without reasonable or probable cause, appeared before a Justice of the Peace and charged the plaintiff with having unlawfully entered in and upon the premises of the defendant, and with having feloniously taken therefrom one mill-saw, the property of the defendant, and upon such charge procured the said Justice to issue his summons to bring him (the plaintiff) before the said Justice, to be dealt with according to law in respect of the said charge; and the said plaintiff being so brought before the said Justice on the said summons, the said Justice, having heard the charge, adjudged that the said plaintiff should make restitution of the saw, or pay the defendant \$4.50 and costs: that the proceedings were afterwards quashed by the Court of Queen’s Bench, and the prosecution thereby determined, &c.

The pleas were not guilty, that the proceedings were not quashed and that the prosecution was not determined before the commencement of this action.

The information complained of was as follows: “The information and complaint of Robert Hassard, of the Village of Cedarville, in the Township of Proton, in the said County, taken upon oath before me, the undersigned, one of Her Majesty’s Justices of the Peace in and for the said County,

who saith that on Wednesday, the Eighteenth day of August, instant, one Thomas Rogers, of Proton, aforesaid, did unlawfully enter in and upon the premises of this deponent, at Cedarville, aforesaid, and did unlawfully and feloniously take therefrom one Mill Saw, the property of this deponent, contrary to the Statute in such case made and provided."

It appeared from the testimony of the Justice who took the information that the defendant told him the plaintiff had taken the saw from his shop, during his absence: that he wrote a note for the return of the saw: that one Patterson was in the shop when the plaintiff took the saw: and as the saw was not returned the defendant came to him to lay the information. Upon the defendant's evidence, taken at the hearing before the Justices, being read to the Justice, the witness said that the evidence did not differ from what the defendant told him before he drew the information up. He said, "I can't say defendant used the word stolen, he said taken. I understood it to be the same thing":—again, "I cannot say he used the word stolen, but from defendant asking for a warrant I concluded he meant that." The Magistrate only issued a summons.

Patterson, who was in the shop when the plaintiff took the saw away, stated that the plaintiff asked him if defendant said anything about a saw. Witness said, no. Plaintiff then lifted the saw, a piece of a saw, saying, "this is not the piece, but I will take it: tell defendant that I have taken it"; and Patterson said that he told the defendant this when he came in. The defendant, however, swore that he did not hear Patterson say that plaintiff had left any such word for him as Patterson stated until the day of the Court when Patterson gave his testimony; and that what he told the Justice was that Patterson told him the plaintiff had come into his shop and had taken the saw: that it was his, defendant's property, and that he wanted to punish him for doing so. He stated also that he did not use the word "feloniously" and did not know the meaning of the

word, or that it meant stealing; and that the Magistrate did not tell him what it meant: that he supposed he charged the plaintiff with going unlawfully and taking his saw away.

The learned Judge at the trial was of opinion that as the word "feloniously" appeared in the information, there was an absence of probable cause. The introduction of that word was a question at the trial. The fact that the saw was taken by the plaintiff, as stated, was not disputed, nor that the defendant related the facts truly to the Justice, except that the defendant did not tell the Magistrate all that Patterson told him: however, as already stated, defendant denied having heard Patterson say that the plaintiff told him to tell the defendant he had taken the saw.

The case was tried before the Judge of the County Court of Wellington, and a jury, when a verdict was found in favour of the defendant. The plaintiff in the following term obtained a rule *nisi* to set aside the verdict on the ground that the verdict was perverse and against law and evidence, which was made absolute.

From this decision the defendant appealed,

The appeal was argued on the 15th March, 1878 (*a*).

S. Richards, Q. C., for the appellant. The plaintiff stated the facts, as proved, to his attorney and the magistrate, who both thought the act in question a larceny; and even if the defendant had, under the circumstances, used the word "feloniously," it would be held that he had reasonable and probable cause for believing it to be larceny. The jury, however, did not find that he intended to charge the plaintiff with stealing; and the evidence shews that the word "feloniously" was inserted by the magistrate without the authority of the defendant who did not know the meaning of the word, and that he merely intended to charge the plaintiff with having taken the saw away. The Judge set aside the verdict because the jury found that the

(a) *Present*.—MOSS, C.J.A., PATTERSON and MORRISON, JJ.A.

defendant acted maliciously in making the charge; but it does not matter whether he was actuated by malice or not, if he had reasonable and probable cause. He referred to *Cohen v. Morgan*, 6 D. & R. 8; *Ravenga v. Mackintosh*, 2 B. & C. 693; *Fellowes v. Hutchinson*, 12 U. C. R. 633; *McNellis v. Gartshore* 2 C. P. 464; *Lucy v. Smith*, 8 U. C. R. 518.

J. K. Kerr. Q. C., for the respondent. The new trial was granted as a matter of discretion only, and in such a case there is no appeal. But the judgment appealed from is correct in law and fact. The evidence establishes that there was no intention on the part of the plaintiff to steal the saw, and an utter absence of reasonable and probable cause for the defendant thinking that he did; and the jury found that the defendant was actuated by malice in making the charge. It clearly appears that the defendant meant to charge the plaintiff with stealing, as he not only used the word "feloniously" in the information, but appeared in Court to prosecute the charge of larceny, and his counsel contended, in his presence, that the plaintiff's act amounted to stealing. He cited *Sinclair v. Haynes*, 16 U. C. R. 247; *Hall v. Hamilton*, 24 C. P. 302; *Patterson v. Scott*, 38 U. C. R. 644; *Munroe v. Abbott*, 39 U. C. R. 78.

March 23, 1878 (a). MORRISON, J. A.—From the magistrate's testimony, the defendant stated nothing to warrant him thinking, at the time, it was, as he stated, a case of larceny, or for the introduction of the word "feloniously" in the information. If that word had been left out, it would have been a mere charge of trespass, and it is to be regretted that the Magistrate did not, in the information, set out the facts charged in the language of the defendant. Upon reading the evidence of the defendant at the hearing of the case before the Justices, I find nothing indicating that the defendant charged the plaintiff with stealing. What was said by Abbott, C. J., in *Cohen v. Morgan*, 6 D. & R. 8, is quite applicable to this

(a) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON, JJ. A.

case. That learned Judge says: "It was for the Justice to say whether the facts amounted to a felony * * After the defendant had related the facts of the case, the Justice's Clerk, instead of writing down what the man really said, wrote down what he took to be the fact, as mere matter of assumption. The defendant never used the words, "feloniously stolen, taken and carried away" according to the language of the information. * * According to the evidence, the defendant merely related his story to the Magistrate, leaving it to him to determine whether the facts amounted to a felony. I noticed at the trial the practice of drawing informations in the manner in which the information in this case was drawn up. I thought it highly improper and think so still. It is the duty of the Justice's Clerk to write down in the information what a witness says as nearly as possible in the language used by the party, and not to frame the deposition in language in which no person in common parlance can be supposed to express himself. I think there is no ground for disturbing the nonsuit."

The general rule seems to be that where the aggrieved party merely states the actual facts to a Magistrate, on which the latter acts according to his own opinion or discretion, the action is not sustainable; neither is malice to be inferred from a mere statement of facts according to the truth. Here the defendant did not, if his own statement is correct, and which is borne out by the Magistrate's testimony, charge the plaintiff with felony when before the Magistrate, laying the information in question.

In *Leigh v. Webb*, 3 Esp. 165, an action for malicious prosecution, the plaintiff called the Clerk of the public office in Bowstreet, who produced the information, which contained no direct charge of felony. The warrant issued was on suspicion of having feloniously taken and having in his possession casks, the property of the defendant. Lord Eldon, who tried the cause, said, at p. 166, "There is no charge of felony contained in the information. It contains a state of facts certainly not amounting to felony, but for which an action of trover could be maintained. The defendant, having lost his property, states the facts to the Magistrate,

upon which he is to form his judgment. If the highest criminal Judge of the land was by mistake of judgment to conceive that to be a felony which did not amount to that offence, and to commit the party complained against, would that subject the party complaining to an action of this sort? I am of opinion it ought not, and that the plaintiff must be nonsuited."

If the Magistrate in the case before us had set out out in the information what the defendant stated to him as alleged by the defendant, and the Magistrate had summoned the plaintiff to answer a charge of felony, it would have been exactly like the case of *Leigh v. Webb*, 3 Esp. 165. Now, what is contended on the part of the defendant is, that the insertion of the word feloniously was the act of the Magistrate and not that of the defendant, who neither used the word or any other word imputing a felony. Assuming that the information was read over to the defendant, yet if he did not understand the meaning of the word so introduced into it and was not told its effect, and that the facts related to the Magistrate did not warrant the insertion of the word "feloniously," the action, I think, would not be sustainable against the defendant.

The jury took the defendant's view of the case, for on delivering their verdict for the defendant they said the defendant did not understand the word "feloniously" in the information, and after being sent back to reconsider the questions put to them by the learned Judge, they found that the defendant did not intend to charge the plaintiff with stealing. I think, on the evidence, they were fully warranted in arriving at the conclusion they did. I see no ground for holding that the verdict was perverse or against law and evidence, and we think that the learned Judge in the Court below ought to have discharged the rule.

The appeal will therefore be allowed, with costs, with the direction that the rule *nisi* for a new trial be discharged.

MOSS, C.J.A., and PATTERSON, J.A., concurred.

Appeal allowed.

LANGFORD V. KIRKPATRICK ET AL.

Distress for taxes after return of roll—Proof of resolution under R. S. O. c. 180 sec. 102—Notice of action.

In an action against a collector and his bailiff for an illegal distress, it was shewn that the distress had been made after the return of the roll; and no resolution authorizing the collector to continue to collect the taxes under R. S. O. c. 180 sec. 102 was proved.

Held, reversing the judgment of the County Court, that the distress was illegal; and that there was no presumption that the collector had received such authority merely because it was conceded that he acted as collector in directing the levy.

Quere, referring to *Holcomb v. Shaw*, 22 U. C. R. 92, even if such a resolution had been proved, it would be ineffectual.

The notice of action stated the time of the trespass committed as "on or about the 28th of May," and the place was described as "at or near the west half of lot 31." The jury found that the seizure took place on the 23rd May; but the evidence shewed that it was only a technical seizure and that the real cause of action was for the seizure on the 28th May, which was followed by the removal and sale. The jury also found that the trespass was committed on the east half of lot 32.

Held, that the notice was sufficient, as reasonable certainty only is required, so as to identify the acts complained of, and prevent the defendant from being misled.

Appeal from the Junior Judge of the County Court of the County of Simcoe.

This was an action of trespass and conversion against the defendant, Kirkpatrick, collector of taxes, and his bailiff, Caruthers, with a count for assault.

Plea: not guilty by statute: Con Stat. U. C. c. 126, ss. 1, 9, 10, 11, 16, 17 & 20.

The case was tried before Gowan, Senior County Judge and a jury.

It appeared that the defendant Kirkpatrick was appointed collector of taxes for the year 1876, and that the defendant Caruthers acted as his bailiff. By the roll Kirkpatrick was directed to collect from the plaintiff \$27.95, of which \$20.25 was for arrears, and \$7.70 for the taxes for the year 1876. It was proved that the arrears had in fact been paid to the county treasurer by the person liable, on the 2nd March, 1876. In the preceding February, a list had been sent to the township treasurer in which the lot, occupied by the plaintiff was charged with these arrears in accordance with

the statute, and if in the list transmitted in June the payment of the arrears was mentioned, it escaped the attention of the township officers. On the 23rd of April, 1877, the defendant Caruthers proceeded with his warrant to lot 32, in the 2nd concession, upon which the plaintiff resided, and demanded payment of the whole amount of \$27.95. The plaintiff was absent, but the bailiff accepted from his wife on account of the taxes an order from the township reeve upon the Council for \$3.75. On the 23rd of May, Caruthers made another demand, when the plaintiff repudiated all liability for arrears, but offered to pay the balance due upon the taxes for the year 1876. The bailiff was unable to state the amount of this balance, but promised to consult the collector. The collector was no more prepared than the bailiff to inform the plaintiff of the precise amount due for the last year, and took no pains to ascertain whether the plaintiff's statement that the arrears had been satisfied was correct. He seemed to think that his duty required him to collect the whole amount inserted on his list, and he told the plaintiff all he could do was to collect what was on the roll. On the 28th of May, after the collector had returned the roll, the bailiff made a seizure of the plaintiff's cattle, and they were subsequently sold. The bailiff had previously accepted a sum of \$2 on account, the plaintiff still professing his readiness and willingness to pay the balance if he were informed of the amount.

The plaintiff proved a notice of action, in which the time of the alleged trespass was stated to be "on or about the 28th day of May last," and the place was described as "at or near the west half of lot 31, in the 2nd concession of Mulmur." In answer to questions put to them by the learned Judge, the jury found that the seizure took place on the 23rd of May, and was made on plaintiff's lot, namely, the east part of lot 32, in the 2nd concession.

It was objected at the trial that the notice was insufficient, and leave was reserved to move to enter a verdict for defendants or for a nonsuit.

A verdict was found for the plaintiff, and a rule *nisi*

to set it aside and enter a nonsuit, on the ground that no malice was alleged or proved against the defendants who were acting as township collector of taxes and collector's bailiff, and upon leave reserved at the trial, was made absolute by the learned Junior Judge.

The plaintiff appealed.

The case was argued on the 15th March, 1878 (a).

D. McCarthy, Q. C., for the appellant. The defendants were not entitled to any notice of action as they had no jurisdiction; but if they were so entitled the notice of action in question defined, with sufficient certainty, both the time and the place where the trespass was committed. The defendant, Kirkpatrick, was not authorized at any time to act as collector, inasmuch as the roll was not certified under the hand of the clerk, in accordance with sec. 89 of R. S. O. c. 180. Even if he had previously possessed such authority, he was *functus officio* at the time of the seizure, as he had returned the roll; and no resolution of the council under section 102 of R. S. O. c. 180, authorizing him to continue to collect the taxes was proved. But if such a resolution had been proved, it would have been of no avail, as *Holcomb v. Shaw*, 22 U. C. R. 92, decides that the council has no power to confer such authority. The learned Judge thought that, having returned the roll and continued to act as collector, it must be presumed that he did so under the 102nd section; but the presumption in such a case can extend no further than to dispense with proof that he was the collector; it cannot be held to remove the necessity of proving the resolution. The seizure was illegal, as the plaintiff was ready and willing to pay the taxes actually due, but the bailiff refused to accept less than the amount he had distrained for, and was unable to inform him how much his taxes were for the year. Under these circumstances, it is submitted that the tender was sufficient: *Sibbald v. Roderick*, 11 A. & E. 38;

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Hurrell v. Wink, 8 Taunt. 369; *Clark v. Woods*, 2 Ex. 395; *Corbett v. Johnston*, 11 C. P. 317; *Coleman v. Kerr*, 27 U. C. R. 5; *Squire v. Mooney*, 30 U. C. R. 531. The action was properly brought in trespass, and it was unnecessary to allege malice as the defendants had no jurisdiction. The authorities establish that a collector cannot shield himself behind an invalid roll: *Coleman v. Kerr*, 29 U. C. R.; *Haacke v. Marr*, 8 C. P. 441. *Spry v. McKenzie*, 18 U. C. R. 561, is a decision to the contrary, but it was overruled by *Harling v. Mayville*, 21 C. P. 499.

Bethune, Q. C., for the respondents. It is well settled that even if these defendants were acting under an invalid roll, owing to the absence of the certificate, yet, inasmuch as they acted in good faith, they were entitled to notice of action: *Selmes v. Judge*, L. R. 6 Q. B. 727. The notice should be clear and explicit, but in the notice which they received neither the time nor the place is correctly stated. It alleged that the seizure was on the 28th of May, whereas the jury have found that it took place on the 23rd of that month. Such a notice was clearly insufficient, as the cases shew that the exact time must be given: *Martins v. Upcher*, 3 Q. B. 662; *Breese v. Jerdein*, 4 Q. B. 585; *Parkyn v. Staples*, 19 C. P. 243; *Sprung v. Anderson*, 23 C. P. 153-160. Then the place was wrongly described, as the seizure was made on lot 32, and not on lot 31, as stated in the notice. It cannot be disputed that a collector has no power to levy after the roll has been finally returned, but no such return was shewn here. The roll was merely handed in to the township treasurer to enable him to prepare the non-resident list for the county treasurer. The statute requires something more than this to be done to constitute a return; for instance, the collector is obliged to make oath to certain facts, under section 101 of R. S. O. ch. 180. And until he had made his return, he had full authority to collect the taxes, even though the time for making such return had gone by: *McBride v. Gardham*, 8 C. P. 296; *McLean v. Farrell*, 21 U. C. R. 441. If, however, the Court are of opinion that the roll was returned, then it should be presumed that he

acted under a resolution of the Council. Kirkpatrick expressly says in his evidence: "I had authority from the Council to collect arrears." This statement was not objected to at the trial, or the resolution would have been proved. The case of *Holcomb v. Shaw*, 22 U. C. R. 92, which is relied upon by the appellant, should not be followed, as its effect is to nullify the 102 section. But in any event, this action cannot be maintained, as there was no malice alleged or proved, and the jury have found that the defendants acted in good faith.

McCarthy, Q. C., in reply. The bailiff merely touched the cattle on the 23rd of May, but this action was brought for the trespass which occurred on the 28th of May, when the cattle were taken away and sold. The defendants' counsel admitted at the trial that there had been a return of the roll.

March 23, 1878. (a) MOSS, C. J. A. — There are two questions presented for our decision upon this appeal. The first is, whether the plaintiff gave the defendants sufficient notice of action; and the second is, whether he can maintain an action for trespass, instead of resorting to a special action charging malice and want of reasonable and probable cause.

The plaintiff gave a notice of action to which objections have been taken. It is clear from the principles enunciated in *Selmes v. Judge*, L. R. 6 Q. B. 724, and in our Court of Common Pleas in *Sprung v. Anderson*, 23 C. P. 160, that the defendants were entitled to a proper notice. It is objected that in the notice in question there is no sufficient statement of time or place.

After a full and ample examination of the authorities, the learned Judge, who pronounced the decision in Term against which this appeal is brought, arrived at the conclusion that the notice was sufficient.

I am of opinion that the view taken by the learned

Judge is entirely correct. It accords with common sense, and is not in real conflict with any of the decisions. It would be profitless to review these decisions in detail, for they have been amply explained and illustrated in late cases in our own Courts, of which *Parkyn v. Staples*, 19 C. P. 243, and *Sprung v. Anderson*, 23 C. P. 152, may be taken as examples. It is sufficient to observe that while the rule is, that the time and place of the act complained of must be set forth, the disposition of the Courts is to exact no more than reasonable certainty. The statute requires that the cause of action shall be clearly and explicitly stated, and with that requirement the Courts do not assume to dispense. But where such reasonable particularity is used as sufficiently to indentify the act or acts complained of, there is a compliance with the language and spirit of the enactment.

Even in *Martins v. Upcher*, 3 Q. B. 662, which has been sometimes thought to have prescribed a rigid rule, and upon which much reliance was placed in the argument before us, Lord Denman observed that he did not go so far as to say that a party will always be strictly bound to prove the time and place which he names in his notice; but that he thought the words of the statute require a time and place for the occurrence to be named. In *Jacklin v. Fytche*, 14 M. & W. 381, Rolfe, B., explained that *Martins v. Upcher*, 3 Q. B. 662, is an authority only that the party must give time and place as far as he reasonably can, and Alderson, B., seems to have thought that the proper test of sufficiency is, whether the notice gives all reasonable information.

Here the jury have found that the seizure was made on the 23rd of May. It is true that on that day the bailiff made what may be technically deemed a seizure; but he neither remained in possession of, nor took away the cattle. The trespass he committed was no more substantial than if he had touched one of them with his finger. It is needless to say that it is not of this proceeding that the plaintiff complains. His cause of action is the seizure on the 28th of May, which was followed by the removal and sale. At

the trial his counsel expressly stated that it was in respect of that seizure, and that alone, damages were sought.

The point of the objection to the statement of place is, that the notice names as the scene of the wrongful act "at or near the west half of lot 31," while the jury have found that the seizure was actually made on plaintiff's lot, which is the east part of lot 32. It would be a cruel refinement of an enactment, which only requires the cause of action to be clearly and explicitly stated, to give effect to this objection. Even if the description had been of the west half of lot 31 I should have been prepared to hold it sufficient, considering that the defendants could not have been misled, and that there is great difficulty in defining the exact boundaries of lots in partially cleared districts. It would seem a mockery of justice to determine that the plaintiff's right to succeed should depend upon whether the exact spot at which the seizure was made lay to the east or to the west of the boundary line between the lots. It would be somewhat inconvenient to require a jury to try the question of boundary in order that the Court might pronounce upon the sufficiency of the notice.

I am of opinion that without swerving in the least from the line drawn by the authorities, we can sustain the decision of the learned Judge upon this branch of the case.

The question then arises, whether the defendants have shewn any lawful authority. The defence of the bailiff may be dismissed with the single observation that it stands or falls with that of the collector.

There is no question that the defendant Kirkpatrick was duly appointed collector by the township, and proceeded to discharge the duties of the office. It is made a question whether he was armed with the powers given by the statute to such officers, because the roll delivered to him was not certified by the township clerk, but in the view we take it is unnecessary to express any opinion upon that point at present. It is urged on behalf of the plaintiff that defendant's authority, if he ever possessed any, had ceased, because he had returned the roll before the distress was

levied. No question touching this point was put to the jury, and I think it is fairly to be inferred from the report of the trial that the defendants ultimately conceded that there had been a return. It is, however, argued now that this is not the result of the evidence. I cannot accept that view. When first called on his own behalf, the defendant said, without qualification or reserve, that he had returned the roll before the 1st of May. So far was he from pretending that he acted under the authority of a roll still in his hands, that he expressly said: "I had to make my return by the 1st of May, but I had authority from the council to collect arrears." He founded his justification not upon the roll, but upon some authority from the council, the character of which he did not explain.

Being re-called at a later stage of the case, he stated that he gave the roll to the township treasurer only to enable him to send his non-resident list to the county treasurer, but never resumed possession of it; and he expressly says that he never afterwards had it in his hands as collector. From this testimony the only proper conclusion is, that the collector had made his return.

The learned Judge, however, held that as it was conceded that the defendant had acted as collector in directing the levy, it ought to be presumed that he had received lawful authority. With great respect for the learned Judge, whose able opinion I have carefully read, I am unable to concur in that opinion. This presumption in favour of the existence of authority is founded on the 102nd section of the Assessment Act, (Rev. Stat. O. c. 180), which enables the council in case the collector fails to collect by the day appointed for the return, to authorize by resolution the collector or some other person to continue the levy and collection of the unpaid taxes, in the manner and with the powers provided by law for the general levy and collection of taxes. No such resolution was proved in this case, and the argument that the statement by the collector in the witness box that he had authority from the council to collect arrears afterwards was sufficient, scarcely requires serious refutation. It

is said that the admissibility of such a statement for any purpose was objected to by the learned counsel for the plaintiff, but even if it passed unchallenged, it was not evidence of the passing of a resolution under the 102nd section.

If the case of *Holcomb v. Shaw* 22 U. C. R. 92, was well decided, and if it is applicable to the provisions of this statute, it shews that such a resolution if passed would be ineffectual. Even conceding that the effect of that decision is as the defendants counsel contends to nullify the 102nd section—a view which I am not prepared to accept—we certainly should pause long before we ventured to throw any question upon a case which has so long been unchallenged. The Assessment Laws have not only been amended and modified, but more than once remoulded and recast since that judgment was pronounced. There has consequently been abundant opportunity of reversing the decision by legislation, if it were unsound in principle or inconvenient in practice. But without pursuing that enquiry to any greater length, it is sufficient for the disposition of the case to hold, as we do, that no presumption of the passing of such a resolution can properly be raised in favour of the defence. If the defendant had been so authorized, the proper proof was easy and accessible. It relates to the conferring and execution of a power not vested in any person *quâ* collector, for any other person may receive the authority. It was just as incumbent upon the defendant to establish the creation of this new power, as it would have been if he had never acted as collector under the roll. Again, the point we are now considering seems to fall within the familiar rule that the *onus probandi* rests upon the party within whose knowledge the matter peculiarly lies. It appears that the township council are the real defenders of this action. Some of their officers were present at the trial, and I think no one can doubt that if a resolution had been passed in pursuance of the 102nd section, the defendants would have relied, not upon presumption, but upon proof.

PATTERSON and MORRISON, J.J.A., concurred.

Appeal allowed.

LEPROHON V. THE CORPORATION OF THE CITY OF OTTAWA.

Jurisdiction of Local Legislature—Power to tax incomes.

Held, reversing the judgment of the Queen's Bench, 40 U. C. R. 478, that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities.

Semble, per HAGARTY, C. J. C. P., and BURTON, J. A., that the Legislature of Ontario did not intend to include such an income in the exemptions mentioned in 32 Vic. ch. 36, sec. 9, sub-sec. 12, O., as one derived "elsewhere out of this Province."

Per PATTERSON, J. A., that by that statute, if *intra vires*, such incomes are exempt.

THIS was an appeal from the judgment of the Queen's Bench, making absolute a rule *nisi* to set aside a verdict for the plaintiff and enter a verdict for the defendants, reported 40 U. C. R. 478. The pleadings and facts are fully stated there, and in the judgments on this appeal.

The case was argued on 4th September, 1877. (a)

C. Robinson, Q.C., for the appellant.

M. C. Cameron, Q.C., and Bethune, Q.C., for the respondents.

The arguments of counsel were substantially the same as in the Court below.

The following additional authorities were cited:—

For the appellant: *Sully v. The Attorney General*, 5 H. & N. 711; *Udney v. The East India Co.*, 13 C. B. 733; *Veazie Bank v. Fenno*, 8 Wallace, 533; *Regina v. Hill*, 2 E. & B. 179; *Re Goodhue*, 19 Gr. 366; *Cooley on Taxation*, 43, 51, 61; *Pomeroy on Constitutional Law*, 190-2; *Hilliard on Taxation*, 148; *Senior on Income Tax*, 128; *Bank of Commerce v. New York City*, 2 Black 620; *L'Union St. Jacques de Montreal v. Belisle*, L. R. 6 P. C. 631; *Regina v. Wood*, 5 E. & B. 49, 55; *Saunders v. Evans*, 8 H. L. C. 721-729; *Osborn v. United States Bank*, 9 Wheat. 739, 859, 860; *Brown v. State of Maryland*, 12 Wheat. 445, 436; *Bank Tax Case*, 2 Wallace 200; British North

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America Act, sec. 91, sub-sec. 8; sec. 92, sub-sec. 2; secs. 130, 131.

For the respondents : *In re Venour's Settled Estates*, L. R. 2 Chy. Div. 524; *Dennison v. Henry*, 17 U. C. R. 276; *Thomson v. Pacific Railway*, 9 Wallace 579; *Trustees of the Methodist Church v. Ellis*, 38 Ind. 3; 29 & 30 Vic. ch. 53, secs. 4, 8, 9, 10, 36 & 40; 16 Vic. ch. 182, sec. 5; Municipal Act of 1866, sec. 225; British North America Act, secs. 90, 125, 129, 92 sub-secs. 8, 13 & 16; 32 Vic. ch. 36, secs. 4, 5, 8, 9, 10, 35 & 39; 34 Vic. ch. 18, sec. 1 O.; *Maxwell on Statutes*, 264.

March 30, 1878. (a) SPRAGGE, C.—This suit is by an officer of the House of Commons of the Dominion of Canada, against the Municipality of the City of Ottawa, and raises the question whether it is within the power of the Municipality to tax, for municipal purposes, the salary of the plaintiff, derived from his appointment as an officer of the House of Commons.

We are informed by counsel for both parties, that it is not their wish that any distinction should be drawn between the position of the plaintiff and that of the ordinary civil servants of the Dominion Government, but that this suit be taken as a test question, applying to all the officers of the Government of the Dominion, so far, at least, as they can make it so.

The questions involved in this appeal have been very fully and ably discussed at the bar, as well as in the judgments given in the Court below, and by Mr. Justice Moss at the trial of the cause: so fully, indeed, that I do not find it necessary to go at such length into the question raised as I otherwise should do; and I do not propose to discuss at all the question whether the plaintiff's salary was exempt under the words of sub-sec. 12, of sec. 9, of the Ontario Assessment Act of 1868-69, 32 Vic. ch. 36, O., exempting "any salary derived by any person from Her Majesty's

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Imperial Treasury, or elsewhere out of this Province." I propose to discuss the general constitutional question only. Our function upon this appeal is, in my view, only that of interpreters of the constitution under which we live and are governed,—the British North America Act.

The powers of the Dominion Legislature and of the Provincial Legislature are distributed in classes assigned to each. The Provincial Legislature having only the powers specifically conferred; the Dominion Legislature having, besides those specifically conferred, all powers not specifically conferred upon the Local Legislature. It would seem to follow that Acts of the Provincial Legislature which conflict with the powers conferred specifically or generally upon the General Government are *ultra vires*: so, on the other hand, Acts of the Dominion Parliament or Government conflicting with powers conferred exclusively upon the Provincial Legislature, would be *ultra vires*,—would be Acts of usurpation. This must result from each being creatures of the one power; each deriving its authority from the one source.

For executing the functions assigned to each, some machinery was necessary, and an essential part of it would be executive officers; and so we find, in the clauses of the Act distributing functions and powers to the Dominion and to the Provinces, respectively, provision is made accordingly. For the Dominion, in class 8, sec. 91, in these terms: "The fixing and providing for the salaries and allowances of civil and other officers of the Dominion of Canada"; and for the Provinces in class 4, of sec. 92, in these terms: "The establishment and tenure of Provincial Offices, and the appointment and payment of Provincial Officers."

Other clauses of sec. 92 have also been referred to as bearing upon this question. By sub-sec. 2, authority is given to Provincial Legislatures for "direct taxation within the Province in order to the raising of a revenue for Provincial purposes."

Sub-sec. 8, has "Municipal institutions in the Province."

Sub-sec. 13, "Property and civil rights in the Province."

Sub-sec. 16, "Generally all matters of a merely local or private nature in the Province."

Certain powers are given in terms, and certain powers must arise by implication from the conferring of powers to deal with certain matters, upon the principle that general powers being given in respect of a certain subject matter, these powers carry with them all that is necessary for their due execution.

To apply this to the case of Municipal institutions. The raising of money is necessary for their due and effectual working; and the giving to them the power to raise money by taxing inhabitants of the Municipality for Municipal purposes, would seem to be within the power of the Provincial Legislature. There is, at the same time, an implied limitation upon every power conferred, whether conferred in terms or by implication, that it must not encroach upon or interfere with the powers conferred elsewhere. To apply it to the case before us, the power to tax, whether by Provincial Legislatures directly or the Municipal bodies empowered by the Legislature, is limited by this implied disability.

What the Legislature of Ontario has done (assuming it for the present not to be *ultra vires*) has been to declare income to be personal property, and to make land and personal property liable to taxation for Municipal purposes; at first continuing an exemption then upon the Statute book, and then by a subsequent Act, the Act of 1871, abolishing that exemption; leaving incomes of Dominion as well as Provincial officers, as a rule, liable to taxation as a species of personal property. Indirectly the Legislature has done this: it has enacted that all incomes (with some exceptions that do not apply here) shall, under the name of personal property, be liable to taxation for Municipal purposes, and that the salaries given by the Dominion to its officers shall be no exception. It is not quite accurate to say that the tax is upon an inhabitant of a Municipality, *qua* inhabitant. It is upon the salary of a Dominion officer, whose official duties make it necessary, or at least proper, that he

should reside in a certain Municipality. Residing there, his salary for services to the Dominion is taxed.

The function of the Dominion in regard to its officers is thus defined: "The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada"; in other words, to fix the amount and mode of compensation and to provide for its payment. I premise that the Provincial Legislature cannot do indirectly what it cannot do directly. If it cannot impose a direct tax upon public salaries, Dominion as well as Provincial, it cannot empower Municipalities to do so, under the name of personal property or otherwise.

Among the powers of the Provincial Legislature is this: "Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes." It would, I apprehend, be within the competence of a Provincial Legislature, under this power, to impose a *pro ratâ* tax upon all salaries given to *Provincial* officers. It would be so because it would be acting upon those over whose salaries they have control. But suppose such tax imposed upon the salaries of all officers of Government, Dominion as well as Provincial, it would raise a very different question; it would impose a burthen upon the salary of the Dominion officer. The salary fixed by the proper authority of the Dominion Government would be subject to reduction by Provincial authority.

There would, moreover, be an incompatibility between the action of the two authorities. One, the Dominion Government, fixes the salary of a certain officer at a certain amount, being, it is be presumed, a proper compensation, and no more than a proper compensation, for the duties he is to discharge; another authority, a Provincial Legislature, intervenes and reduces the amount below what is fixed as a proper compensation, and does this in the case that I am putting in order to the raising of a revenue for Provincial purposes.

If it be said that the Dominion Government, in fixing the amount of salary, would take into account all that the

recipient of the salary would have to bear, not only household expenses, servants' wages, rent, fuel, and the like, but also taxes, we may take as a test the case of taxes imposed to raise a revenue for Provincial purposes. The Dominion Government might well object that it was only a mode of taking a portion of the revenue of the Dominion to assist in the raising of a revenue for Provincial purposes; and palpably it would be so, indeed so plainly so that a tax in such terms would scarcely be pressed. But suppose a general income tax passed by a Provincial Legislature in order to the raising of such a revenue, and we had to deal with a claim for exemption by an officer of the Dominion, could we fail to see that the necessary effect of such a tax upon him was either diminishing the amount fixed by the Dominion Government as proper compensation, so intervening between the Dominion and its servants in a matter strictly within its competence; and supposing it argued that such tax was probably taken into account in fixing the amount of salary, would not the answer be that that could not be assumed, as it would be taking a portion of the revenue of the Dominion to aid in raising a revenue for Provincial purposes? If this could not be done by way of direct taxation for Provincial purposes, can it any more be done in order to the raising of a revenue for Municipal purposes? It would be conferring upon Municipalities a power not possessed by the body by whom the power was assumed to be conferred. It may be put thus: the power to tax directly the salaries of Dominion officers is not possessed by a Provincial Legislature, but a Provincial Legislature may confer such power upon Municipal bodies. This would at once stand condemned as an illogical proposition.

It has been put by the advocates for the imposition of the tax, that the question is a very trivial one; that it is idle to suppose that a state would not be as well served if its officers have to pay Municipal taxes, as if they are exempt. I do not know that it can be said that Municipal taxes in cities (and Government officers as a rule must live

in cities) are so light as not to be felt to be burdensome by those who pay them. If a man's salary is measured by his necessities, taxes not being taken into account, taxes would be a burthen not counted upon and not provided for. A truly conscientious man would serve the state as faithfully and perhaps as well though the burthen might be heavier than he had counted upon, but it is not desirable in the interest of the state that its servants should be underpaid; the tendency, be it great or small, is to impair their efficiency, and so to lessen their value as public servants.

As public servants, they are an essential part of the means and instruments by which the Government of the Dominion is carried on; and the question is not whether they will discharge their duties, although burdened with Municipal taxes, but whether a Provincial Legislature has the power to impose a burthen upon any instruments by which the Dominion Government is carried on.

The position of the civil servants only of the Government has so far been considered, but the Dominion has other than civil servants. Among the duties committed by the constitution to the Dominion is that relating to the "Militia, Military and Naval service, and defence." The pay of officers of Her Majesty's service is exempt from Municipal taxation by the Ontario Acts of 1866 and 1869. The Dominion has exclusive jurisdiction also in matters of navigation and commerce. The service of all officers employed on these duties is for the benefit of the whole and of every part of the Dominion. Suppose a military force embodied, or a naval force constituted, would the pay of the officers, wherever stationed, be subject to taxation for Municipal purposes? It would seem strange if they were; yet their position is substantially the same as that of the civil officers of the Dominion. All are alike means and instruments by which the affairs of the Dominion are administered.

I have referred to the conflict of authorities, Provincial and Dominion; the encroachment by the former upon the functions of the latter, as defined in our Constitutional Act;

and the anomalies to which, in my opinion, the claim of the defendants leads. The question is not one of degree, but of principle; the principle being that a tax by or through a Provincial Legislature, upon the means or instruments by which the Dominion Government is carried on, is *ultra vires*, and therefore void.

I have explained shortly the reasons which have led me to this conclusion, without referring so far, to the American cases upon like questions arising in the United States. Those cases, without being authorities in the sense that the decisions of the Courts of the Mother Country are authorities binding upon us, are yet entitled to the highest respect. They are the judgments of very eminent jurists, whose minds have been trained to the consideration of these and cognate questions, from the frame of their constitution, with powers of government distributed, some to a federal authority, and some to governments of States, analogous generally to the allotment of powers with us, some to the Dominion and some to the Provinces, with this difference, that powers not specified reside in the several States, as well as those specifically committed to them, while only those specifically committed to the federal government belong to that authority. The converse is the case in our constitution, and the difference makes the American decisions *a fortiori* in favour of the principle affirmed by them; perhaps I should rather say that the principle is, if anything, more free from difficulty in its application to our constitution, than to that of the United States.

I have examined these American cases with great attention, and could not fail to be struck with the great erudition and ability displayed in the masterly judgments delivered by the very learned Judges before whom they were heard and adjudicated upon.

Many passages from these judgments appear in the published reports of judgments delivered in this case, and others are quoted in judgments to be delivered in this case by learned Judges in this Court. That being the case, I do not propose myself to quote from the American cases, but content

myself with expressing my high appreciation of their great merits and value, adding only this, that the process of reasoning upon which the Judges in these cases proceed is in my humble judgment incontrovertible.

My opinion is, that the judgment of the Court below should be reversed, and that the plaintiff is entitled to a verdict, and that the judgment should be for full costs.

HAGARTY, C. J. C. P.—The general subject has been so fully discussed in the judgments already delivered here and below, that I wish to confine my remarks into as narrow a compass as possible.

Before and at Confederation, the power to tax in the Parliament of Canada was unlimited.

Income derived from office was unquestionably assessed and assessable under certain exceptions, covering the plaintiff's case. The claim against the plaintiff rests therefore wholly on the legislation of the Ontario Parliament.

The much discussed sub-sec. 12, of sec. 9, in the Act of 1866, copied into the Local Assessment Act ch. 36 of 32 Vic., when it speaks of a pension, salary, &c., derived from the Imperial Treasury or elsewhere out of this Province, *i. e.*, Canada as it was then, left the whole class of merely Canadian officials unaffected.

But when the same words were used by an authority limited to Ontario, it becomes important to consider whether the plaintiff is not necessarily included in the exemptions. He is certainly a person with a salary derived out of this Province of Ontario.

It is contended with much force that the whole exemption clause refers to Her Majesty's military and naval service, and that we must regard the special intent of the clause to control any apparent generality of the language used.

The words, to my mind, are unquestionably wide enough to reach the plaintiff's case. If soldiers, sailors, or in fact any Imperial agents or servants be alone intended, the reference to the Imperial Treasury would have been quite

sufficient. The words, "or elsewhere out of this Province," *i. e.*, Ontario, would be wholly needless if Imperial agents be alone affected by the clause.

The clause must be either confined to the army and navy, or the general words would seem to prevail. If we do not confine it to the two services, then it must cover all salaried officers and pensioners of the Imperial Treasury, military and civil. The military have been already provided for by the words "full or half pay."

If the Imperial Government had any civil servants under pay in Ontario, I think the words would certainly apply to them. But as such civilians are included, can we exclude all other civilians drawing salary "elsewhere out of Ontario."

A Dominion official, doing duty for the Dominion in Ontario, would seem to be as much out of the reach of the Ontario taxes, as an Imperial official resident therein.

For many years, I understand, in the United States, Municipalities have been allowed to assess income; but in England such power is only exercised by the State for national purposes, and it has been always spoken of as a great resource in exceptional emergencies. It is not easy to understand the principle on which such a property is made a subject for taxes of a purely local character.

I do not desire to discuss the wisdom of such a law. I content myself with remarking that, to my understanding, it is wholly unintelligible how it is brought within the grasp of a merely local rate. I only notice this as it bears upon the widening or the narrowing of our judicial interpretation of this exemption clause.

Unassisted by a reference to any other parts of the Statute, I think we would naturally construe this clause so as not to credit the Legislature with the intention of allowing each City or Township Municipality to assess for local rates all the salaries of Dominion officials happening to reside therein. But a perusal of the whole Assessment Act leaves, in my mind, an impression that the Ontario Legislature considered that it had the right to tax salaries

derived from sources outside its jurisdiction, otherwise they have exhibited needless caution in specifying exemptions.

They declare the official income of the Governor General and also of the Lieutenant Governor to be exempt: also, immediately following the exemption clause, so much already discussed, they exempt all pensions of \$200 a year and under, payable out of the public moneys of the Dominion of Canada or of this Province. But they go further in caution by declaring as the first of exemptions, "All property vested in Her Majesty," &c., &c., which, by sec. 125 of the Federation Act, was declared not to be liable to taxation. It may be that this particularity in exemptions was designed to facilitate the operations of the assessors, and not as indicative of the assertion of a right to legislate on the subject.

When, in the subsequent Act, the Legislature specially repealed the exemption clause as to Government officials, we must naturally suppose that they understood it as a subject within their powers.

I do not feel clear as to the complete application of the ordinary rules of construction of Statutes being fully applicable to the Statute of a Legislature not possessing, as it were, legal omnipotence over the subject matter.

A glance at the rules of construction elaborately stated in such cases as *Hawkins v. Gathercole*, 6 DeG. M. & G. 1, and the very late decision of *River Wear Commissioners v. Adamson*, L. R. 2 App. Cas. 762 (judgment of Lord Blackburn), may perhaps suggest some difficulties as to the application of these rules to the laws of a limited jurisdiction.

I prefer, however, to rest my decision on a broader ground.

We must take the Confederation Act as a wholly new point of departure. The paramount authority of the Imperial Parliament created all the now existing Legislatures, defining and limiting the jurisdiction of each. The Dominion Government and the Provincial Governments alike spring from the one source. For the purposes of our present discussion, I see no practical difference in

the principles governing the relations of these new jurisdictions and those that have been declared to regulate the relative authorities of the United States and the several State Governments.

Whether the governing principles be set forth in the written constitution of the United States, or be embodied in an Act of Parliament passed by paramount authority, as in our case, creates no difficulty, in my mind, as to the application of the broad principles laid down by the distinguished American jurists so often referred to in this discussion. Our law books are necessarily almost barren of authority on the subject of limited Parliamentary jurisdiction. It is to the Marshalls and Storys of the neighbouring Republic, and to their successors in that Court which is still true to the traditions of the best age of American jurisprudence, that we have to look for guidance and assistance on a subject most familiar to them—most unfamiliar to us.

We must bear in mind that the class of officials sought to be taxed owe their existence to the new state of things. No such officers existed prior to Federation. The plaintiff is an officer of a new organization, and bears, in my view, a wholly different position from an officer of the superseded Parliament of Canada, which was the sole source of legislation for Ontario. The Dominion Government have to appoint numerous officers to carry out their peculiar functions and jurisdictions, and who, for such purposes, have to be resident in various parts of Canada.

Sec. 91 of the Federation Act gives to that Parliament the exclusive jurisdiction of (sub-sec. 8), "Fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." The same Act, sec. 92, sub-sec. 2, gives to Ontario the exclusive right of "Direct taxation within the Province, in order to the raising of a revenue for Provincial purposes."

Can this latter right be exercised on the salary of the Dominion officer fixed by his Government ?

If it can be at all, it can of course to an unlimited extent.

According to the decisions of the United States Supreme Court, the exercise of such a right would impair, if not defeat, the operations of the Federal authorities. I need not repeat the language on this head cited in judgments already delivered.

Then, when we look at the right given to the Provinces of "Direct taxation within the Province," can these words legitimately extend to such a subject matter as an income derived wholly or partially without the Province? If, for example, the Government of Nova Scotia chose to employ an agent for emigration or other purposes at Toronto, could the salary paid to him by his employers be properly a subject for taxation within Ontario? The ordinary meaning of such words would, I think, apparently be taxation on persons and property within the Province.

If such be the true meaning such an income cannot be brought within the grasp of the collectors of local rates, by the Legislature of Ontario attaching any definition it pleases to such a word as "Income." The last illustration rests wholly on the meaning of the words used in the Federation Act.

Our Assessment Act 32 Vic. ch. 36, sec. 5, O., says: "All municipal, local or direct taxes or rates, &c., shall be levied equally upon the whole ratable property, real and personal, of the Municipality or other locality," &c. Sec. 28 speaks of income derived from any trade, office calling, profession or other service whatever, not declared exempt by this Act. The Imperial Income Tax Act, 16 & 17 Vict. ch. 34, sec. 2, provides that Income Tax shall be payable for or in respect of the annual profits or gains arising or accruing to any person residing within the United Kingdom, from any profession, trade, employment or vocation, whether the same shall be respectively carried on in the United Kingdom or elsewhere, or accrue to any person not resident within the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession or vocation exercised in the United Kingdom." This language is far wider and more precise than our Assessment Act. It is com-

mented on in *Attorney-General v. Alexander*, L. R. 10 Ex. 20.

Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheaton 316, at p. 428, says: "The people of a State, therefore, give to their Government a right of taxing themselves and their property, and, as the exigencies of Government cannot be limited, they prescribe no limit to the exercise of this right, resting confidently in the interest of the legislator and in the influence of the constituents over their representatives to guard them against its abuse. But the means employed by the Government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the Legislature which claim the right to tax them, but by the people of all the States. They are given by all for the benefit of all, and, upon theory, should be subjected to that Government only which belongs to all. It may be objected to this definition that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction. This is true. But to what source do we trace this right? It is obvious that it is an incident of Sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the Sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident."

"The sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission: but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those powers are not given by the people of a single State. They are given by the people of the United States to a Government whose laws, made in pursuance of the constitution, are declared

to be supreme. Consequently, the people of a single State cannot confer a Sovereignty which will extend over them. If we measure the power of taxation residing in a State by the extent of Sovereignty which the people of a single State possess and can confer on its Government, we have an intelligible idea of the standard applicable to every case to which the powers may be applied. * *

"We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one Government to pull down what there was an acknowledged right in another to build up."

"We are not driven to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is legitimate use, and what degree may amount to an abuse of the power. The attempt to use it on the means employed by the Government of the Union, in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give. We find then, on just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question, whether it has been surrendered, cannot arise." See also 1 Kent Com., 11th ed., sec. 425.

To my judgment, all these remarks on the relative positions of the Federal and State Governments apply with even greater force to our Canadian Constitution. Ontario can never be looked on as a Sovereign State surrendering certain of her rights to the Government of a Federation of which she consents to form a part. Our Province is the creation of the Imperial Parliament, originally under the Act, 31st, Geo. III. ; again, on the union of the Upper and Lower Provinces as "Canada ;" and lastly, under the Federation Act. Our present legislative powers have their origin from the latter enactment.

It was suggested that the power of disallowance by the Governor-General of any Provincial law was a sufficient check on any abuse of the taxing power, so as to ensure against any prejudicial impeding or affecting the provision

made for Dominion officials. I do not see how the existence of such a power can affect the constitutionality of the enactment.

The officers of the Dominion do not exercise their functions within the bounds of any of the Provinces by the permission of the local Government. They are there by authority of a higher power.

In the words already cited, the Province has no Sovereignty over them or their salaries, as existing by its authority or introduced by its permission.

The Federation Act (sec. 125) declared the "lands and property" belonging to the Dominion, should not be subject to taxation. We may understand the general object to be the prevention of any claim to place a burden on the assets and resources of the general Government. Quite within the spirit of such legislation, though outside its letter, would be the extension of the prohibition to the moneys applied to the remuneration of services for the performance of the necessary duties of that Government.

The reasoning of the Supreme Court seems to me to be sound, and directly in point on the case before us, and, in my judgment, ought to be adopted by us.

I think the appeal must be allowed.

BURTON, J. A.—Among the reasons against the appeal, the point is taken that the plaintiff is not an officer of the Dominion government; but it was abandoned upon the argument, and it was stated by counsel on both sides that this is in fact a test case, in which both parties are desirous of having the judgment of the Court upon the substantial question in issue. I have assumed therefore that the plaintiff is such an officer, and have considered the question in that view.

The case presents itself in two aspects: 1st. As to whether upon the proper construction of the Assessment Acts of Ontario, the income of the plaintiff derived as a salary from the Dominion government is declared exempt, and if not, 2nd, whether the legislature of Ontario has

power to impose a tax upon the salary of such an officer, or to confer such a power upon the several municipalities.

In tracing back the Assessment Acts of Ontario we find that until the passage of the 29 & 30 Vic., ch. 53, there was no exemption of any of the official salaries of the officers and servants of the several departments of the Executive Government and of the two Houses of Parliament; but by the 23rd section of that Act they were declared to be exempt; and such was the state of the law when the British North America Act was passed and Confederation established.

The Ontario Legislature, in its session of 1868-9 continued this exemption, applying it in terms both to the government officials of the Dominion and those at Toronto.

But that Act was varied by the Ontario Statute of 1871, and the local Legislature have manifested their intention by the repeal of sub-sec. 25 of sec. 9, to discontinue the exemption.

It was indeed contended that under sub-sec. 12 of sec. 9, this salary was exempt, as included under the words, "any salary * * derived by any person from Her Majesty's Imperial Treasury, or elsewhere out of this Province." The first and concluding portions of that section have reference to the full or half pay of Imperial military and naval officers and their personal property when on actual service, and it is quite possible, though by no means free from doubt, that that portion of the section which refers to any pension, salary, gratuity or stipend, must refer to that class of persons deriving them either from the Imperial treasury or from some Colonial or Foreign government; and not to a class of persons like the plaintiff, whom the Legislature seemed to think it necessary to exempt by express words, but which exemption they intended to sweep away by the Act of 1871; and this would seem to be borne out by the 13th sub-section, which exempts all pensions of \$200 a year payable out of the public moneys of the Dominion of Canada, which would have been already exempt under the 12th sub-section if the words "elsewhere out of this Province," are to be construed as the plaintiff contends.

We have had occasion in a previous decision to refer to the difficulty of applying the ordinary rules of construction to the present assessment Acts, but upon the best consideration I have been able to give to the matter, I have individually come to the conclusion that the Legislature of Ontario has manifested its intention to tax these official incomes, and that effect must be given to that intention unless it should be found to be *ultra vires*; and the point really for consideration is their power to do so.

In considering this question we shall derive but little assistance from English decisions, as under their system the question could probably only arise if an attempt were made by a Colony to tax the salary of an officer of the Imperial government, and because the parliament of England has not yet discovered the propriety of conferring on local or municipal authorities the power to tax incomes or other property which derives no benefit from municipal government or police regulations. Under any well matured or intelligible system we would expect to find municipal burdens so apportioned that the property partaking to a greater or less extent of the benefits of police protection and local improvements would bear their fair proportion; and one would naturally expect that real and personal property having an actual situs within the municipality including household furniture and effects, would be selected as fit subjects for taxation; but upon what principle a person deriving an income from property not protected by the municipal authorities should be taxed *upon that income*, it is difficult to discover, and the incongruities and injustice of the system now in force in this province are brought out in bolder relief when we refer to recent legislation, conceding additional power to municipalities of granting moneys in aid of local railways and manufactures, for which a person assessed solely upon income is compelled to contribute, although he is by the same law excluded from the privilege of voting upon the by-law granting such aid, notwithstanding that he may be the largest ratepayer on the assessment roll.

It is merely necessary to state the case to demonstrate its manifest injustice. This is, however, an anomaly with which the Legislature alone can deal. We have nothing to do with the policy or impolicy, the justice or injustice of taxing such a description of property for purely local purposes, but are confined to the consideration of whether the local Legislature has the power to impose, or authorize a municipal body to impose, a tax upon that description of income which is granted as a salary by the dominion government to one of its officials, or whether such an exercise of power is *ultra vires*, and the levy of the tax illegal.

Both the Dominion and the several Provinces of which it is composed, derive their legislative powers under what is known as the British North America Act of 1867. A parliament for the whole Dominion, consisting of the Queen, Senate, and House of Commons, is thereby established; and under the 69th section a Legislature for Ontario, consisting of the Lieutenant-Governor and one House, styled the Legislative Assembly of Ontario, is likewise established.

The powers of these several legislative bodies are defined by the 91st and 92nd sections of that Act. By the former the Queen, with the advice and consent of the Senate and House of Commons, is to make laws for the peace, order and good government of Canada, in relation to all matters *not coming within the class of subjects assigned exclusively* to the Legislatures of the Provinces; and for greater certainty, but not so as to *restrict* the generality of the foregoing terms, it was declared that the exclusive legislative authority of the parliament of Canada should extend to all matters coming within certain defined classes of subjects, *inter alia*, "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada." And the Act provides that any matter coming within any of the classes of subjects enumerated in this section, shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the legislatures of the Provinces.

By the next section, which in similar terms defines the exclusive powers of the Provincial Legislature, it was provided that the local Legislature might make laws in relation, *inter alia*—sub-section 2—to “direct taxation within the Province in order to the raising of a revenue for provincial purposes;” and—section 8—to “municipal institutions in the Province;” and—sub-sec. 16—“generally all matters of a merely local or private nature in the Province.”

If the Provincial Legislature could not, for provincial purposes, impose a tax of this nature, *a fortiori*, they could not delegate such an authority to a municipal body for carrying out the mere purposes of municipal government—such as the paving of streets, police, and other matters that come within the jurisdiction of those bodies.

We are driven then to consider the broad question whether, under our Federal system of Government, a Provincial Legislature is prohibited from taxing an officer of the Dominion for his office or its emoluments, the argument against such power of taxation being that such a tax having the effect of reducing the compensation for the services provided by the Act of the Dominion would, to that extent, conflict with the Act and tend to neutralize its purpose.

The Supreme Court of the United States has held in a long course of well considered decisions, commencing with *McCulloch v. Maryland*, 4 Wheat. 316, that the States cannot tax the agencies of the general Government, for, as it is urged, if they could, it would be within their power to impose taxation to an extent that might cripple, if not wholly defeat, the operations of the national authorities within their proper sphere of action.

Mr. Justice Morrison is reported to have said, in giving judgment in the Court below, that the principle laid down in that case has been reversed by a subsequent decision in the case of the *National Bank v. The Commonwealth*, 9 Wall. 353; but with great deference I am unable to agree in the views which he takes of the judgment in that case.

The learned Judge who delivered that judgment referring to the leading case, remarks that the doctrine which exempts the instrumentalities of the general Government from the influence of State taxation, being founded on the implied necessity for the use of such instruments by the government, such legislation as does not impair the usefulness or capability of such instruments to serve the Government, is not within the rule of prohibition; in other words, that the State Legislature might exert their power of taxation generally upon persons and property within their boundaries, but that they could not thereby interfere with any functions of the nation; so far from being in conflict with the leading case it appears to me to confirm it, drawing a distinction between the power of the State government over the person and property of the official and the right to tax the *means* used by the government of the Union to execute its powers.

A similar question was raised in *Osborn v. The United States Bank*, 9 Wheat. 738.

The state of Ohio had laid a special tax of \$50,000 a year upon a branch of the bank, no doubt for the express purpose of destroying it. But the Court fully affirmed the principles laid down by C. J. Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, and held the tax invalid.

I also fail to see how the case of *Dobbins v. The Commissioners of Erie County*, 16 Peters 435, is distinguishable; still less would I venture to question the soundness of a decision in which so eminent a jurist as Chief Justice Taney, followed the opinion of his illustrious predecessor, Chief Justice Marshall, whatever might be my view of its application to the case under consideration. The learned Judge who delivered the opinion used this language, at p. 447: "Taxation is a sacred right essential to the existence of a government; an incident of sovereignty. The right of legislation is co-extensive with the incident to attach it to all persons and property within the jurisdiction of a State. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and

in the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions; and the States are restrained by such as are necessarily implied in the constitution when the exercise of the right by a State conflicts with the perfect execution of another sovereign power delegated to the United States. That occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign powers."

For the same reasons, although for some time a different opinion prevailed, the national government cannot tax the agencies of the State government. The same supreme power which established the departments of the general government determined that the local government should also exist for their own purposes, and should retain their original powers, except in so far as they were granted to the government of the United States.

In *Collector v. Day*, 11 Wall. 113, Nelson, J., at p. 127, says in respect to the "Reserved powers," "The State is as sovereign and independent as the general Government. And if the means and instrumentalities employed by that government to carry into operation the powers granted to it are necessarily, and for the sake of self-preservation, exempt from taxation by the States, why are not those of the States depending upon their reserved powers, for like reasons, equally exempt from Federal taxation. * * In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation; as any government whose means are employed in conducting its operations, if subject to the control of another and distinct government, can only exist at the mercy of that government. Of what avail are these means if another power may tax them at discretion?"

The question arose in a somewhat different form in 1862, in the case of *The Bank of Commerce v. The City of New York*, 2 Black 620.

The Statute of New York State provided for taxing banks upon the amount of their capital. The bank had a capital of several million of dollars, and the largest proportion of it was invested in United States securities, which the bank claimed were exempt from taxation. The assessors fixed the taxable property of the bank at the whole value of the capital stock, without regard to the fact of its being chiefly invested in the public debt of the United States, but added that the assessment was not made upon the public debt, but upon the bank capital.

The Court of Appeals of New York held the assessment valid, distinguishing it from *Weston v. The City Council of Charleston*, 2 Peters 469; the distinction insisted on being, that in the latter case the tax was laid upon United States stocks "*eo nomine*," while in the New York case the securities were included in the mass of property owned by the corporation and were taxable with that aggregate. The Supreme Court repudiated that distinction and reversed the decision. It was conceded that the taxing power, so far as it was reserved to the States and used by them within constitutional limits, cannot be controlled or restrained by the national Court, the prudence of its exercise not being a judicial question, but that a State tax on the loans of the general Government is a restriction upon the constitutional power of the United States to borrow money, and if the States had such a right, being in its nature unlimited, it might be so used as to defeat the national power altogether.

Prior to this decision the laws of New York had required that the capital stock of banks should be assessed and taxed at its actual value. Shortly after it, the legislature of New York changed the language of the statute, and enacted that all banks should be liable to taxation, at a valuation equal to the amount of their stock and their surplus earnings. Under this the bank was assessed and taxed upon such valuation. The Court of Appeal again sustained the action of the assessors, and held that the tax was not imposed upon the bank capital, and as a consequence was not

imposed on the national securities in which such capital was invested; the substitution of an intangible valuation instead of the real capital, was treated as a substantial change. But the Supreme Court in the bank tax case, swept away these refinements, and re-affirmed the doctrine of *The Bank of Commerce v. New York*, 2 Wall. 200.

The case referred to in the Court below of *Melcher v. The City of Boston*, 9 Met. 73, does not conflict with these decisions. The plaintiff there was not an officer of the national government, but was a clerk in the Post Office, appointed by the Post-master, and paid by him from funds at his disposal for the general management of the office. The Judge, it is true, seemed to hold different views upon the subject generally from those expressed by the eminent jurists I have referred to, but was careful not to commit himself to any decided opinion, and admitted that he had not investigated the question, as the plaintiff had failed to bring himself within *Dobbins v. The Commissioners of Erie County*, 16 Peters 435, he not being an officer of the United States in any such sense as would exempt him from taxation on income.

The reasoning in these cases, apart from the high authority of the distinguished jurists who decided them, is to my mind so convincing as to leave no room for doubt, unless a distinction can be drawn so as to render them inapplicable under our system of Government. It is said that the relative positions of the United States and the several States of the Union, differ essentially from that of the Dominion and the several Provinces; but granting this, is there any intelligible distinction as regards the question we are now discussing?

In the case of the American Constitution, as appears by the recital in that instrument, *the people of the United States*, in order to form a more perfect Union, &c., ordained and established that constitution, and declared that it and the laws of the United States, which should be made in pursuance thereof, and all treaties made under the authority of the United States, should be the supreme law of the

land—that is to say, as has been well expressed, “It means, that so far as the people of the United States—*the nation*—have seen fit to delegate a portion of their own inherent powers of legislation and government to their appointed rulers, just so far those appointed rulers are supreme throughout the land in the exercise of those delegated powers.”

The 9th article of the amendment provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people; and the 10th provides that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

Here then we find the former article recognizing the people as the one source of all power, as they could not retain what they were not before possessed of, and the latter speaking of some powers which had not been conferred by the people on its general government as allotted to the States.

The powers delegated to the Government of the United States, like those granted by the Imperial Legislature exclusively to the Dominion, concern, speaking generally, public functions and duties of a higher and more extensive order than the remaining powers which the people reserved to the States governments. In other words, the people entrusted to the central authority the powers and functions which were deemed necessary for carrying on the government of the Union, whilst those deemed appropriate for the carrying on the government of the individual States, were reserved to the State authorities.

With the exception of the power of declaring war and making treaties, the powers granted to the general government of the United States are similar to those granted by the Imperial Legislature to the Dominion—among others, the power of appointing its own officers, and an unlimited power to raise money by any mode or system of taxation.

The States had also originally the power to tax as bodies

politic, which power was still retained in all instances, and in all methods, except so far as they are restrained by the national constitution—that is to say, they are expressly restricted from imposing taxes or duties on exports from any State, duties on imports or exports or tonnage; and although there is no express restriction, there is the implied limitation of imposing taxes on the property of the general government, or upon the means which that government has adopted to carry on its public affairs. The principles enunciated in these decisions apply, as it appears to me, with equal, if not greater force, to cases of a similar nature arising under our own Constitution. In the one case the government of the United States was created, not (as is sometimes inaccurately stated) by the several States, but by the people of the United States—the *nation*, possessed of supreme power—whose creature and agent the government of the United States is. In the same way the States derive their authority from the same source, the sovereign people; the powers of legislation and administration are derived from them; those granted to the central government are, as in our own case, higher and more national than those entrusted to the local government, but, as with us, *within their respective limits each is uncontrolled by the other*. We also derive our Constitution from the sovereign power, the legislature of Great Britain. The powers granted to the Dominion are very similar to those granted by the sovereign power to the government of the United States. The powers granted exclusively to the Province are very similar to those reserved to the States, each government is distinct and separate from the other.

But it is said that there is this important difference from the Federal Constitution of the United States, that the Dominion government have in their hands a check upon the legislation of the Provinces, in the power of disallowing any statute passed by them, so as to prevent any legislation which tends to obstruct, defeat, or impede the Dominion legislation. No doubt there is this additional check, and in cases where a Pro-

vincial Act is supposed to affect the whole Dominion, or to exceed the jurisdiction conferred on local Legislatures, or even where the jurisdiction is concurrent, but clashes with the legislation of the general Parliament, this power of disallowance has been sometimes, but not invariably exercised; but whether allowed or not, to the extent that the Provincial Acts transcend the competence of the Provincial legislature they are void. If I am right in supposing that the local Legislature had no power to impose this tax, no declaration of exemption was of course necessary, and there was nothing upon the face of the Municipal Act which either called for or would have justified its disallowance. All that can be said is, that the Act does not warrant the tax in question. The exemption which was contained in the former Acts was in itself partial and unjust, relieving officials at Toronto and Ottawa from the tax, but leaving all officers in other places liable to its exaction. If the construction I place on the law be correct, all these officers will be placed on the same footing, all equally relieved, because they are all agents of the Dominion government, whose salaries neither the Province nor the municipal authorities can interfere with.

And lastly, it is urged that this is a mere fanciful ground of objection, and that the tax is in itself so small as not to interfere materially with the salary which the government has allotted to the plaintiff; but if the power exists at all, it can be exercised to any extent, and in the event of any Province being dissatisfied with the Dominion government, it would hold in its hands a weapon which it might resort to to harass the government and enforce its demands.

I am therefore of opinion that the tax was illegally imposed, that the appeal should be allowed, and the rule *nisi* to set aside the verdict discharged with costs.

PATTERSON, J. A.—It is unnecessary to notice the pleadings in this case. The parties agree that the sole question to be tried is whether the Corporation of the City of Ottawa can legally assess and collect from an officer of the

House of Commons of Canada a tax or assessment upon his income, derived and received as set out in the agreed statement of facts; and the material facts are that the plaintiff lives in Ottawa and has his place of business there, and that the income in respect of which he is taxed is his salary as an officer of the House of Commons. The tax was imposed under the assumed authority of the Ontario Assessment Act, 32 Vict., ch. 36, O.

The plaintiff disputes the power of the Provincial Legislature to tax the salary of an officer of the Government of Canada; and he contends that, even if the jurisdiction exists, he is exempt by the terms of the Assessment Act.

The constitutional question which is raised has engaged the attention of four learned Judges, before coming before us upon this appeal. The present Chief Justice of this Court, by whom the case was tried, held, at *nisi prius*, that the jurisdiction claimed for the Local Legislature did not exist. In the Queen's Bench the Chief Justice took the same view; while the majority, consisting of my brother Morrison, who was then a member of that Court, and Mr. Justice Wilson, were of a different opinion.

The difficulties indicated by this even balance of judicial opinion retain their magnitude as we proceed with the consideration of the subject. They arise not so much from divergent views in the application of principles upon which all are agreed, as from uncertainty as to the principles themselves upon which the solution should rest; and for this reason they can only be definitely removed by a court of final resort.

Before referring to the British North America Act, 1867, it may be useful to note the history of the Assessment law, so far as it seems to touch the matter in hand; and to consider its application to this particular case.

The present system of Assessment dates from 1850, having been initiated by the Act, 13 & 14 Vict., ch. 67.

Before that date the property liable to be rated was defined by the Act of 1819, 59 Geo. III., ch. 7. It comprised land, dwelling-houses, mills, store-houses, shops, horses,

oxen, cows, young horned cattle and pleasure carriages. The statute fixed arbitrary values for assessment purposes upon the property of different classes within these general divisions.

The Act of 1850, 13 & 14 Vic. ch. 67, declared all land and all such personal property as the Act defined, in Upper Canada, liable to taxation, subject to certain specified exemptions. Personal property was defined as including all such goods, chattels, and other property, as were enumerated in schedule A, and no other. The enumeration in the schedule was confined to horses, neat cattle, carriages, stocks-in-trade, and shares in vessels owned within the municipality. And section 4 of the statute provided that "no person deriving income from any trade, calling, office or profession, exceeding the amount of £50 per annum, should be assessed for a less sum as the amount of his net taxable property than the amount derived from such income during the year then last past, but such last year's income shall be held to be his net taxable personal property, unless he had other taxable personal property to an equal or greater amount."

This Act did not profess to tax income simply as income. Under it a man having an income of £500 a year from his profession, and owning horses, carriages, or shares in steamers to the value of £500 or upwards was taxed nothing in respect of his income; but if he had only £400 of other personal property, he was assessed for £500, that is for his income alone, taking no account of the other property; his income being held to shew the amount of his net taxable personal property.

There may be no difference that will bear examination between this idea of calling income personal property, and taxing income *eo nomine*. In fact the same statute provided a form for inserting it upon the assessment roll as "amount of taxable incomes." I merely note the facts that at first the tax was not upon *all* income; and that, by the device of calling the last year's income the taxable personal property of the current year, the direct avowal of the imposition of an income tax was avoided.

The Act of 1850 was repealed in 1853 by 16 Vic. ch. 182, which amended and consolidated the Assessment laws.

As before, all land and personal property (subject to exemptions) were made liable to taxation; and the Act extended the definition of personal property to include all goods, chattels, shares in incorporated companies, money, notes, accounts and debts at their full value, and all other property, except land as defined in the Act and property therein expressly exempted.

It would not be easy to frame a more comprehensive scheme for the taxation of property, even for imperial purposes, than that embodied in these words; but still they did not go so far as to include income in the definition of property.

The clause respecting the taxation of income was in the same words as in the Act of 1850, leaving the law on that particular subject just as it was. One of the exemptions which originated in this Act I shall have occasion to refer to again, farther on. Sec. 6 enacted that the following property shall be exempt from taxation:—

“Eighthly—The full or half pay of any one in any of Her Majesty’s naval or military services, or any pension, salary, or other gratuity or stipend derived by any person from Her Majesty’s Imperial Treasury, or elsewhere out of this Province, and the personal property of any such persons in such naval or military services on full pay, or otherwise in actual then present service; nor shall such persons be liable to perform statute labor or to commute for the same.”

The Act of 1853 took its place in the Consolidated Statutes of Upper Canada of 1859, as chapter 55, without alteration in any of the particulars to which I have alluded, except that the reference to statute labor was omitted; and it continued in force until 1866, when it was repealed, and a new Assessment Act, 29 & 30 Vic. ch. 53, was passed.

This Act repeated the provisions I have quoted from the previous Act, with no other change than including income in the definition of personal property—“—debts at their

full value, *income* and all other property"—and it added to the exemptions, "23. The annual official salaries of the officers and servants of the several departments of the Executive Government and of the two Houses of Parliament resident at the seat of Government."

The Assessment law in force when confederation took place was that of 1866, 29-30 Vic. ch. 53.

Up to that time, as I have shewn, the Legislature had never imposed for municipal purposes, or indeed for any purpose, a general income tax. Income was only taken into account when its amount exceeded that of the ratepayer's taxable personal property. If the property was in excess of the income, he was not taxed on income. If the income was the larger amount, the property was not reckoned; but the amount of the last year's income was taken to be the amount of his net taxable personal property; and, whether he had other personal property or not, the salary of a person in the position of the present plaintiff was exempt from taxation.

The confederation was effected in 1867.

In 1869 the Legislature of Ontario passed the Assessment Act, 32 Vic. ch. 36, O. In this Act the definition of personal property given in the Act of 1866, which included "income," was retained; but the taxation of income was put on a new footing. It was not left to depend upon the accident of the non-existence of other property, but was made the subject of specific assessment. The closing provision of sec. 35 is "Such last year's income, in excess of \$400, shall be held to be his net personal property, unless he has other personal property liable to assessment, in which case such excess and other personal property shall be added together and constitute his personal property liable to assessment." But while incomes in general were thus distinctly made liable to taxation, the salaries of the officers and servants of the several departments of the Executive Government and of the Senate and House of Commons, resident at the seat of Government at Ottawa, and of the officers and servants of the several departments of the Government of Ontario,

resident at Toronto, were (by sec. 9, sub-sec. 25,) exempted.

In this state of the law the present contest could not have arisen.

It has become possible, by reason of the repeal of sub-sec. 25 in 1871, by 34 Vic. ch. 28, O.

The defendants urge that the effect of this repeal is to bring the salary of the plaintiff distinctly under the operation of sec. 35, and to make it liable to taxation.

The plaintiff, while relying upon the constitutional question, also contends that he is still exempt by force of sub-sec. 12 of sec. 9, 32 Vic. ch. 36, O. This sub-sec. resembles the sub-sec. 8, which I have already quoted from the Act of 1853, but extends the exemption to the houses and premises occupied by certain persons whom it specifies. Its language is, "12. The houses and premises occupied by any of the officers, non-commissioned officers and privates of Her Majesty's regular army or navy in actual service, *and the full or half pay of any one in any one or either of such services; and any pension, salary, gratuity or stipend derived by any person from Her Majesty's Imperial Treasury, or elsewhere out of this Province;* and the personal property of any person in such naval or military services on full pay, or otherwise in actual service." The plaintiff contends that his salary is an income derived from an extra provincial source, within the meaning of the words, *salary derived out of this Province*.

Reading the sub-sec. by itself, it does, in my opinion, cover the case of the plaintiff. It deals separately with the three subjects of taxation, lands, income, and personal property. As to two of these, viz: their dwelling houses and their personal property, it exempts such naval and military men as may happen to be on duty in the municipality, but no other persons. The first part and the last part of the clause, omitting the middle part which I have put in italics, deal with these two exemptions. The other branch is not confined to soldiers and sailors. It is covered by the words I have italicised.

I perceive no principle of construction which requires

the words "elsewhere out of this Province" to be limited in their signification to the classes provided for in the first branch and the last branch of the clause; and I imagine I can see good reason for struggling against 'so construing it, even if the grammatical indications of such a meaning were stronger than they are. It is only this clause, so far as I can discover, which relieves such a person as the Consul of a foreign state from being called upon to contribute a per centage of his official salary to the funds of the local municipality where he happens to live, (assuming for the moment the power to tax the incomes which residents derive from beyond the Provincial limits); and I do not know why he has not at least as good a claim to exemption as a half-pay officer who, for his own convenience or pleasure, chooses to live in the same town.

We should be obliged, in my opinion, in giving to the language of the clause its plain grammatical meaning, to read the exemption as embracing the salary paid to a Consul by the state he represents; or coming from without the province to any recipient who happens to live here.

It is argued, however, that the intention is apparent from other parts of the statute not to include in this particular exemption salaries paid by the Government of Canada; and some specific exemptions are referred to, which, it is said, would have been unnecessary except on the understanding that sub-section 12 did not treat the Central Government as being "elsewhere out of this Province." Thus sub-section 11 exempts the "personal property and official income of the Governor-General, and the official income of the Lieutenant-Governor of the Province"—the salaries of both these officers being paid by the Central Government; Sub-section 13 exempts all pensions of \$200 a year and under, payable out of the public moneys of the Dominion of Canada, or of the Province; and sub-section 25 exempted the salaries of officials both of the Central and Local Governments who were resident at the Seat of Government. It is further urged that by repealing sub-section 25, the Legislature asserted the right and intention to tax the salaries of Dominion

officials. It cannot be denied that these are objections of great weight against the construction for which the plaintiff contends; and they are further enforced by the fact that the language in question is merely repeated from the statutes of earlier date than confederation. On the other hand, there are not wanting considerations which weaken their force. It happens that each of the sub-sections 13 and 25 deals not only with incomes derived from the Dominion Government, but also with those paid by the Province. In expressly exempting those of the latter class, it may well have been that *ex majori cautela*, and to guard against the inference that one being expressly exempted the other was meant to be liable, both were included in the express exemption. It is according no exceptional distinction to this statute to say that we do not find it framed with so much precision and care as to make it always safe to deduce the necessity for a particular provision from the fact that we find it there. For proof of this we need not go beyond this ninth section. Thus, the express exemption by sub-section one, of all property vested in Her Majesty, or vested in any public body or body corporate, officer or person in trust for Her Majesty, or for the public uses of the Province, involves the assumption that there was power to tax property which section 125 of the British North America Act declares shall not be liable to taxation. Sub-section 18 professed to exempt all real and personal property owned out of the province—a meaningless provision if it referred to property which was not in the province; and one which contradicted the whole scheme of the assessment law, if the idea was to exempt property in the province when its owner lived elsewhere. This inadvertency was corrected by a later statute. Then we have sub-section 21, exempting the annual income of any person, provided the same does not exceed \$400—a correct enough provision, but unnecessary; because section 35, under which income is assessed, makes only the excess over \$400 taxable.

Provisions like some of these may, though not strictly necessary, be more practically useful than a more scientific

arrangement of the enactments. My only object in criticising them is, to point out that we cannot disregard the characteristic structure of the Act, when we are asked to reason from the existence of sub-sections 13 and 25 that the Legislature could not have intended the language of sub-section 12 to bear what would otherwise be its plain signification—these two sub-sections not being inconsistent with No. 12, but only covering again a part of the same ground. The influence of sub-section 11 upon the construction of sub-section 12 is certainly no greater than that of 13 and 25. Passing over the circumstance that it is a continuation of the provision which, from 1853 downwards, had applied to the Governor or Lieutenant-Governor of the province, which may have no significance, because during all that time the salary was paid by the legislating province; and merely noticing that, placed as it is immediately before sub-section 12, it may properly be read with it as one clause, and so read there would be no room for the argument now founded upon it; we should hesitate to infer that the Legislature considered an express exemption necessary to prevent the Corporations of Ottawa and Toronto insisting upon a percentage of the sums appropriated under sections 60 and 105 of the B. N. A. Act, to the representative of the Crown and his lieutenant, because by the same rule we should have to regard sub-section 1 as shewing that the Legislature supposed it had power to tax public property.

The argument from the repeal of sub-sec. 25 is, that the Legislature in 1871 indicated by that measure the intention that thenceforward the incomes mentioned in that clause should be taxed; that, in fact, the bare repeal was equivalent to an affirmative enactment that they should no longer be exempt. Doubtless this would have been its effect, if the exemption depended upon this clause, as it did in the case of the Ontario salaries. It was a clause which, as I have already pointed out, dealt with Provincial as well as Dominion salaries; and it contained another feature which may have excited opposition to its continuance, by creat-

ing a distinction of an invidious character between those officials who lived at the seats of government, and their fellows who were scattered through the province.

I have given my opinion of the effect of this clause and No. 13 together. I do not see that if its existence failed to qualify the operation of sub-sec. 12, that result can have been accomplished by its repeal.

I cannot say I am much pressed by the consideration that the language of sub-sec. 12 was framed before the Dominion was constituted. I am rather disposed to regard the clause as shewing a perception of the unsoundness of the principle on which incomes are made liable to local taxation.

"It is an important principle"—I quote from J. S. Mill—"that taxes imposed by a local authority, being less amenable to publicity and discussion than the acts of the Government, should always be special; laid on for some definite service; and not exceeding the expense actually incurred in rendering the service. Thus limited, it is desirable, whenever practicable, that the burthen should fall on those to whom the service is rendered." In our system of Municipal Institutions the principle of imposing special taxes for special and definite services, though occasionally resorted to, as in the case of the local improvements provided for in secs. 464 and 469 of the Municipal Act of 1873, does not form the general rule; and, considering the scope and variety of the functions and powers of our municipal corporations, it is probably a principle which could not in practice be conveniently extended to the revenue raised for general purposes. But the rule that the burden should fall on those who benefit by the outlay nevertheless holds good; and should apply to exclude the salaries of officials like this plaintiff, if not incomes in general, from contributing to the local expenditure.

It seems not unfair to assume that whatever arguments may have, in the legislative mind, prevailed over the very cogent ones adducible against the taxation of any income.

for local purposes, the incomes derived from extra provincial sources were recognized as proper subjects for exemption ; and to treat sub-sec. 12 as at least embodying that principle, and therefore not to be restricted in its application to the particular instances which we may conjecture were in the mind of the draughtsman who first penned the clause, or of the members of parliament who originally voted for it.

The defendants do not gain much assistance from the direct language of the affirmative provisions of the Act. Section 8 declares that "all municipal, local or direct taxes or rates shall, when no other express provision has been made in this respect, be levied equally upon the whole ratable property, real and personal, *of the municipality or other locality*, according to the assessed value of such property, and not upon any one or more kinds of property in particular, or in different proportions." And by sec. 9, "All land and personal property *in the Province of Ontario* shall be liable to taxation, subject to the following exemptions." There can be no pretence that these words of themselves convey any suggestion of taxing incomes. We have personal property defined as including *income* ; but that word, without more, cannot be read as declaring that such an income as the one now in discussion is personal property in the province, much less property of the locality. Turning to sec. 35, we find that "No person deriving an income exceeding four hundred dollars per annum from any trade, calling, office, profession or other source whatsoever, not declared exempt by this Act, shall be assessed for a less sum as the amount of his net personal property than the amount of such income during the year then last past, in excess of the said sum of four hundred dollars ; but," &c. Reading this by the light of secs. 8 and 9, the natural impulse is to read "No person deriving an income *in this province*, exceeding," &c. The words are not "having" or "being in receipt of" an income, but *deriving* ; the same word used in sub-sec. 12, which exempts incomes *derived* from extra provincial sources. The idea

that extra provincial incomes are covered by the language of sec. 35, comes rather from the exempting clauses than from those relied on as authorizing the tax.

The defendants, who assume to impose a burden upon the plaintiff, have to shew us not merely that it is possible to interpret the statute in the sense for which they contend; but that their reading of it is the natural and proper rendering of its language; or, if the language admits of two constructions, they must shew that that which supports their case is indicated as correct by its accordance with sound principle, or the clear intention of the Legislature.

I am not satisfied that this has been done; and I therefore think that if the case had to be decided on this point, the proper conclusion would be, that they have failed to establish their plea of justification.

The more important question is that of the jurisdiction of the Legislature under the effect of the British North America Act, 1867, which is the Charter of our Constitution.

It has been urged before us, as it was in the courts below, that the constitution of the United States of America is so far analogous to ours that the principles settled by the courts and recognized in practice as governing similar questions with them, may safely be adopted as furnishing the rule by which we should be guided. In one respect the constitutions are similar. There are, in each case, the Central Government and the Local Government, each with its powers more or less distinctly defined and limited. How much farther the analogy extends it is not at present important to inquire, as these are the points of resemblance which affect the matter before us. The importance of having the line which separates the jurisdiction of the Central Government from that of the Local distinctly marked by express stipulation or recognized principles is, in each case, sufficiently obvious.

The British North America Act is the source to which we must appeal for a declaration of the powers of each of our Governments, central and local.

Among the subjects enumerated in sec. 92, as those in relation to which the Provincial Legislature may exclusively make laws, is, "2. Direct taxation within the Province in order to the raising of a revenue for Provincial purposes." There is also, "8. Municipal Institutions in the Province."

It does not strike me that any argument of much force in the present contest can be based upon the latter article; or that it is necessary to resort to it as a basis for argument. If no express power to tax had been given, it is probable the power would, nevertheless, exist as incident to the working of Municipal Institutions; but, as the express power is given, we are not driven to seek for it by implication.

In my judgment, it is in the second article alone we find the foundation and the restriction of the general power of taxation conferred upon the Provincial Legislatures. The general power is to raise a revenue by direct taxation. The restriction confines such taxation within the province. Special powers, such as the power of indirect taxation by means of licenses under the ninth article, we need not notice at present.

Taxation within the province must mean the taxation of property within the province, or a poll tax on persons within the province. The tax now in question is not a poll tax; and the Legislature of Ontario has never professed to tax property out of the province.

I have already quoted the words of sec. 9 of the Assessment Act, which declares that all land and personal property *in the Province of Ontario* shall be liable to taxation; and the words of sec. 8, which put forward the principle of imposing all municipal taxes equally upon the whole rateable property, real and personal, *of the Municipality*. It is true that, by a somewhat recent extension of the definition of property, that word, as now used in the Assessment Act, includes income; and it may be that by expressly exempting extra provincial incomes enjoyed by residents of our province, it is shewn that the Legislature treated those incomes as being property within the province; though, for

reasons already given, it may be that we should not draw that inference from the insertion of the exempting clause; and it is true that municipal bodies have not always been careful to inquire whether the personal property they assumed to tax was in truth property in the province; as in the case of stock in banks whose chief place of business was not in the province, which was in question in *Nickle v. Douglas*, 35 U. C. R. 126, 37 U. C. R. 51. But, having regard to the restriction of the right of direct taxation to the province by the terms of the British North America Act, it is obvious that unless the income in question is in truth *property within the province*, the imposition of any tax upon it is *ultra vires* of the Provincial Legislature; and another reason is furnished for reading the exempting clauses as I have before suggested, and for classing sub-sec. 12 in its relation to incomes derived from extra provincial sources, with the first sub-sec. in its relation to public property, as declaring exempt what there was no power to tax.

In construing the words of the second article of sec. 92 of the British North America Act, "Direct taxation within the Province," as confining the power to tax property to property within the province, and inquiring if these incomes are property within the province, we have necessarily to disregard the definition of property by the Ontario Assessment Act, so far as the status of the income as being property, or as being within the province, depends on that definition. Both the learned Judges who formed the majority of the court in giving the judgment now in review, refer to these incomes as being property within the province, either in their true character or by force of the Assessment Act. That position does not seem to have been controverted; and the question whether a salary paid from abroad to an official living here, or an income such as dividends on stock, like that which in *Nickle v. Douglas*, was held not to be property in the province, can in any proper sense be called property in the province, has not been argued before us. I express no decided opinion upon it; and, as the present decision proceeds upon other

grounds, it is not necessary to do so. I notice the question principally for the purpose of saying that it still remains open.

The eighth article of sec. 91 of the British North America Act enumerates as one of the classes of subjects to which the exclusive legislative authority of the Parliament of Canada extends: "The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada."

The defendants in effect contend that the Assessment Law of Ontario entitles them to require from the plaintiff a share of his salary so fixed and provided for; and that the power of direct taxation within the province enables the Provincial Legislature to confer that right upon the City Corporation.

The claim is resisted upon the same grounds on which the decisions have proceeded in the Supreme Court of the United States, under which the principle has been established that the State Legislatures cannot, by the imposition of taxes or other burdens, impair or do what tends to impair the efficiency of the instruments employed by the Central Government.

The leading case of *McCulloch v. Maryland*, 4 Wheat. 316, and the cases which have followed that most important decision have been referred to and commented on so fully in the judgments delivered in the courts below, and by my brother Burton in the judgment he has just delivered, that I do not attempt any review of them.

The principle which they establish and which is recognized as the settled law of the United States, as I gather from the text writers upon the subject, would pronounce a Statute passed by a State Legislature, and having the effect which the defendants seek to attribute to our Assessment laws, unconstitutional and void; and this, not by the force of any positive provisions of their written constitutions, but upon reasoning which appears to me to be entirely applicable to our constitution, and the force of which is increased by the effect of the eighth article of sec. 91.

It is argued that the reasons which had force in the Supreme Court, when dealing with the Constitution of the United States, are not applicable with us, or have less weight. Thus, when it is said, as in the leading case, at p. 340, "that the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control are propositions not to be denied," the answer to the argument based on those propositions, as it is summarized by Chief Justice Marshall, is very much the same as that by which a similar argument is met before us. He puts it thus, "But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government."

The appeal to confidence which the Supreme Court held to be ineffectual, does not possess, in my judgment, any greater weight when advanced in our tribunals.

There is no security that, in the exercise of a power which is capable of being used to the detriment or embarrassment of the Central Government, the Provincial Legislature will always be guided by a judicious regard for the harmonious working of all the departments of the Constitution. What motive may be found sufficiently powerful to lead to antagonistic legislation or whether any such motive may arise; or whether, from caprice, or from crude theories of political economy, or from any cause whatever, the power now in dispute may be exercised in a vexatious manner, must be matter of speculation.

The very Assessment Law we are discussing affords at least one example of departure from a professed principle, under the influence of a motive of sufficient force. Equality of taxation of all property of the Municipality, real and

personal, is announced as the fundamental principle of the law. Every statute from 1850 downwards has contained the same announcement. It was discovered, however, and was one consequence of taxing personal assets for local purposes, that it was impolitic to treat investments in bank stock as the same money, if invested in real property, would be treated; and, accordingly, by 37 Vic. ch. 19, sec. 3, O., the shares held by any person in the capital stock of any incorporated or chartered bank doing business in this Province, were exempted from assessment for municipal or other local rates or taxes; and the dividends only were made assessable as income. I do not doubt or question the wisdom or the expediency of this change in the law. I refer to it merely as illustrating the instability of professed principles of legislation, even on the subject of taxation, in the presence of a powerful disturbing influence. Who can say that a further discrimination in favour of other property as against the incomes of Dominion officials, or an avowed abandonment of the equality principle, is impossible, for some reason which, in a time of political excitement or discontent, may be thought sufficient to warrant such a measure?

I have had an opportunity of seeing some of the judgments lately delivered in the Supreme Court at Ottawa, in *Regina v. Severn*, and I observe that more than one of the learned Judges, in deciding against the province the question of the right to require a brewer to obtain and pay for a license to sell his beer for consumption in the province, for which the Provincial Government had contended under the ninth article of sec 92,—“Shop, saloon, tavern, auctioneer, and other licenses,”—gave weight, as a reason for the construction which they placed upon the words, “other licenses,” to considerations based upon the impolicy of conferring upon the Local Legislature a power which might be made use of to impede the operations or thwart the policy of the Central Government.

To hold the taxation of the incomes of Dominion officials *ultra vires* of the Provincial Legislature by no means

involves the exemption of those persons from bearing their share of the burdens which ought to be borne by all persons associated within the precincts of a municipality.

The maxim of Dr. Adam Smith, which has met with such universal acceptance, that "the subjects of a estate ought to contribute to the support of the government in proportion to the revenue which they respectively enjoy under the protection of the state," has but little direct application to local municipalities; but even substituting Municipality for State, the rule would seem to be satisfied by a tax on the real property one holds, and perhaps on certain kinds of tangible personal property which may be supposed to benefit by the municipal expenditure. These taxes, of course, every resident or property owner must pay, just as he must pay his rent to his landlord for the house he lives in, from whatever source his money comes. It is so far a matter of *quid pro quo*. But the principle fails when it is applied to the salary. This can scarcely be better illustrated than by reference to the class of officials which include the plaintiff. By the present Assessment Law, under an Amendment made in 1874 (37 Vic. ch. 19 sec. 6, O.,) a person holding an appointment at an annual salary, who performs the duties of his office in a municipality in which he does not reside, is assessed for his salary at the place where he performs the duties, and not at his place of residence.

The City of Ottawa is bounded in one direction by the River Ottawa and in another by the Rideau. Across the Ottawa is the City of Hull, in the Province of Quebec. Across the Rideau is the Village of New Edinburgh, in the Province of Ontario. Many of the officials, whose duties are performed in the parliamentary and departmental offices in the City of Ottawa, reside in Hull and in New Edinburgh.

If municipal taxation is supposed to have any relation to the idea of payment on the one side for benefits conferred on the other, I do not understand why the City of Ottawa can justly claim a percentage of the salaries of these non-resident Government officials. The words of J. S. Mill, used

in reference to one phase of the income tax, which he describes as having the merit of being a very easy form of plunder, would seem not inappropriate to such an exaction.

The injustice, or what strikes me as injustice, becomes distinctly apparent in the cases I have just been speaking of. It is exactly of the same character when the official happens to live in the City of Ottawa.

The objects and purposes of the outlay of our Municipal Corporations, as well as their functions and powers, certainly embrace many matters beyond the range of local police regulations ; but, extensive and varied as they are, I know of nothing in their character which brings the *quid pro quo* doctrine, however liberally interpreted, to the support of the right now in dispute. To take an instance, a substantial proportion of the expenditure of most of our towns and cities, as well as of many rural municipalities, is incurred by the bonuses granted to railway companies or other enterprises, from which the municipality, in fact or in anticipation, derives material benefit. By whom are these benefits enjoyed ? It would be out of place to discuss the policy of incurring onerous debts for the objects alluded to ; but it is apposite to our present purpose to bear in mind that the practice is supported by the argument that property will increase in value, and business will be stimulated ; and these predictions are often verified. Those who have building lots to sell find more purchasers and get better prices ; and those who are engaged in trade find their account in the larger number of customers and the brisker demand ; and the facility for moving agricultural produce, while it brings trade to the city, directly adds to the productive value of the farm. The man who stands outside of all this prosperity is the official working for his salary. In respect of his office and of his salary he derives no benefit. If affected at all, it is more likely to be in the way of harder work and higher rent, yet, though not of the class who gain, he is to be in the class who pay.

We are, therefore, in the absence of other foundation for the defendants' claim, referred back to the sovereignty of

the Provincial Legislature over property and people within the range of its jurisdiction ; to the argument that it is the legislative mandate ; and to the question, is that mandate *intra vires* ?

In the plaintiff's view, the position is this :—For the discharge of my duties and to enable me suitably to maintain myself and those dependent on me, the Parliament of Canada has fixed my salary at \$1500. The defendants, under the assumed authority of the Provincial Legislature, declare that I shall not have \$1500 for those purposes, but that I shall share it with them.

After the best consideration I have been able to give to the case, and with the assistance of the able arguments to which I have listened, as well as the perusal of the judgments delivered at *nisi prius* and in the Queen's Bench, I am unable to find any reason satisfactory to my mind for refusing to apply to this case the principles of the United States decisions.

I think those principles, if properly applied in the circumstances of the cases in which the decisions were given, have an *a fortiori* application in a case like the present, which does not, like several of the American cases, arise in relation to the imposition of a tax for the purposes of the state or provincial revenue, to which the tax itself would be admittedly appropriate ; but in reference to the execution by a local municipality of a power founded, to my apprehension, on a questionable principle.

Acting therefore upon the authority of the eminent American jurists which has settled the question in the neighbouring republic, I hold that the imposition of the tax upon the plaintiff in respect of his salary was a matter which the Provincial Legislature could not authorize without exceeding the authority conferred by the British North America Act. I doubt if, in any proper sense, the plaintiff's salary can be called property within the province, and am therefore inclined to the opinion that it is not reached by the power of direct taxation *within the Province* under the second article of sec. 92, and that we have not

only the prohibition deducible from the ninth article of sec. 91, but a failure of original or *a priori* authority; and I further hold, though with distrust of my correctness, that upon the proper construction of the Assessment Act the exemption of salaries like that of the plaintiff has been recognized, and that the transgression of the provincial jurisdiction exists in the action of the defendants only, and not in the true effect of the statute under which they assumed to act.

I therefore agree that this appeal be allowed, with costs.

Appeal allowed.

CRYSLER V. MCKAY ET AL.

Sale of land for taxes—Proof of taxes in arrear—Description in sheriff's deed, 32 Vic. ch. 36, sec. 155, O. ; 16 Vic. ch. 183, sec. 65.

Held, affirming the decree of the Court of Chancery, that the sale of the land in question was valid, as the evidence, which is fully set out below, shewed that there were five years' arrears of taxes due at the time of the sale.

The land was described in the sheriff's deed as containing "100 acres more or less."

Held, a sufficient compliance with section 65 of 16 Vic. ch. 183.

Semle, per PATTERSON, J. A., where it appears that no portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid ; and the defect is not cured by section 155 of 32 Vic. ch. 36, O., as it only applies to defects in procedure. Where, however, there is evidence of arrears, the case is *primâ facie* within the Statute, though it may be shewn in answer that they were not sufficient to authorize the sale.

Appeal from a decree of the Court of Chancery.

The bill was filed to recover possession of the south half of lot No. 15, in the ninth concession of the Township of Winchester, in the County of Dundas, and to recover damages for trespasses committed thereon by the defendants.

The land in question was sold for taxes in 1855, and the plaintiff claimed title under conveyances from vendees of the purchaser. The defendants set up that the tax sale was invalid owing to five years arrears of taxes not being due when the sale took place, and alleged that they were entitled to the land by length of possession of themselves and those through whom they claimed.

The following extract from the county treasurer's books, was produced at the hearing :—

WINCHESTER.

LOTS.	CON.	GRANTEES.	ACRES.	1846.	1847.	1848.	1849.	1850.	1851.	1852.	1853.	1854. Dec. 1853 & add.
15	9	Chloe Froom.	D. 200					1.0.3 1.0.3 4.0.7	...	S ½ 5.6	7.3 S ½	N ½ 1.0.3 S ½ { 1.13.0 3.3

The other facts are fully set out in the judgment below.

The case came on for examination of witnesses and hearing at the sittings of the Court at Kingston, in May, 1876,

before Proudfoot, V. C., who made a decree dismissing the plaintiff's bill.

The case was reheard in February, 1877, when this decree was reversed.

The defendants appealed.

The case was argued on the 19th December, 1877. (a) *Bethune*, Q. C., for the appellants. The evidence does not shew that there were five years arrears of taxes due at the time the warrant issued. The treasurer's book, which was produced at the trial, is no evidence, as under 59 Geo. III., c. 7, the treasurer was required to keep an account of every lot, charging it with, or crediting it for, the taxes payable in respect thereof for each year; but this book does not shew the arrears for 1847, 1848, or 1849. It is true that in the column for 1850, the figures 1. 0. 3 appear, but it can only be inferred that they mean £1.0.3; and even if they do it does not follow that the whole amount was not due for 1850, as there is no evidence what the taxes were for that year. Then there is nothing charged for 1852, which fact, read in connection with 13 & 14 Vic. c. 66, sec. 42, which required the collector to deliver to the treasurer an account of the taxes that he was unable to collect, would seem to shew that the taxes for that and previous years had been paid. The Statute also requires the account to shew on its face, which this does not, whether the taxes were due on the whole or part of the lot. No evidence was given to shew that the land had been legally assessed. Neither the warrant to the sheriff nor the sheriff's advertisement distinguished lands which had been patented from lands which were under a lease or license of occupation, and it was held in *Hall v. Hill*, 2 E. & A. 569, that such an omission was fatal. The description of the land in the deed is "100 acres, more or less," which is not a compliance with the 65th sec. of 16 Vic. ch. 183, as it requires the land to be described by its "situation boundaries and quantity;" and

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

in a case of this kind the statute should be construed strictly, and the express words of the section followed. It has been proved that taxes were tendered in 1857, which extinguished the claim for taxes. It cannot be held that the sale is made valid by section 155, of 32 Vic. ch. 36, O., as it has not been proved that there were any arrears due; or at all events the taxes for five years were not in arrear. There can be no question that the intention of the Legislature was to do nothing more than make valid sales which had been made when the taxes were in arrear for the period prescribed by the statute under which the sale took place. It does not validate anything except defects in the conveyance. He referred to *Jackson v. Moore*, 18 Johns, 440; *Talluran v. White*, 2 Comstock 69; *Hamilton v. Eggleton*, 22 C. P. 536; *Proudfoot v. Austin*, 21 Gr. 566; *Fraser v. West*, 21 C. P. 161; *Kempt v. Parkyn*, 28 C. P. 123; *Austin v. Armstrong*, 28 C. P. 52; *Williams v. McColl*, 23 C. P. 189; *McDougal v. McMillan*, 25 C. P. 75; *Booth v. Girdwood*, 32 U. C. R. 23; *Blackwell on Tax Titles*, 83, 84.

MacLennan, Q. C., (with him *G. M. Macdonnell*) for the respondent. It is objected by the appellants that we did not prove that the land in question had been legally taxed, but it was unnecessary for us to do so, as the tax was imposed by the Legislature. Under 59 Geo. III., c. 7, the assessors are obliged to make a list of all the ratable property and produce it to the Quarter Sessions, who are to fix the tax. There was no evidence that they did not do their duty, and the maxim *omnia presumuntur esse rite acta* applies. Another statute, 59 Geo. III., c. 8, imposes a tax certain in amount upon uncultivated lands, so that if the land in question is not covered by the former statute, it certainly is by this one; and it puts the onus on the other side of shewing that the land was not taxed. It was shewn by the treasurer's book that the land had been duly assessed, and it is quite clear that arrears existed extending over five years. The treasurer swears that the blanks satisfied him that the taxes had not been paid for five years preceding the 31st December, 1854. In the absence of the

treasurer's evidence the warrant alone was *prima facie* evidence of the taxes being in arrear: *Hall v. Hill*, 2 E. & A. 569. It is not necessary that the warrant should distinguish patented from unpatented lands. The tender cannot assist the appellants as it was too late. Under sec. 17 of 6 Geo. IV., ch. 7, it could have been made to the sheriff within a year, but after that period had elapsed the purchaser's right intervened, and it should then have been made to him; *Proudfoot v. Bush*, 12 C. P. 52. Besides, it was made by the appellants who had no interest in the land at the time of the tax sale. The objection to the description in the deed cannot prevail, as the statute merely required certainty as to what the sheriff sold. (Moss, C. J. A.—You need not argue that point, as we are all of opinion that the description is quite sufficient.) Even if there were not five years arrears of taxes at the time the warrant issued, yet if there were any arrears due the sale is validated by sec. 155. There is nothing in the Act to shew that the Legislature did not intend to deal with just such a case as this. The statute was a remedial measure, passed for the express purpose of quieting the title to land, and where it is indefinite it should receive a liberal construction. Any title the appellants can claim in this suit has been acquired subsequently to the tax sale and adversely to the purchaser, and they cannot under such a title impeach the tax sale by reason of 33 Vic. c. 23, sec. 6, O.

March 4th, 1878. (a) PATTERSON, J. A. delivered the judgment of the Court.—The principal question of fact in this case is, what taxes were in arrear when the warrant was issued in August, 1855.

The books of the treasurer shewing the land to be in arrear are sufficient proof of the fact of the arrear—per Wilson, J., in *Cotter v. Sutherland*, 18 C. P., at p. 395.

One book has been produced to us. We have to see what it shews.

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

The land is alleged to have been sold in 1855 for the taxes of 1850, 1852, 1853, and 1854, at all events. The treasurer says the arrears extended back to 1846, 1847,, 1848, and 1849.

The book shows opposite to the entry of lot 15, the letters "Psh" written in the columns under the dates 1841, 1842, 1843, 1844, and 1845, which is said by Mr. McDonald, who became treasurer in October, 1846, to indicate that the taxes for those years had been paid to the sheriff. Then there are blank columns for 1846, 1847, 1848, and 1849. In the column for 1850, there are the

figures $\frac{1. \ 0. \ 3.}{40/7}$ without anything to denote what they mean.

The 40/7 is apparently intended for the addition of the two other sums, and does not seem to have any import as a separate entry. The 1851 column is entirely blank. That for 1852 contains the entry "S $\frac{1}{2}$ 5/6," and that for 1853, "S 7/3."

After 1853, the Act 16 Vic. c. 182, was in force, and under its provisions a new system of entries became necessary.

Before noticing this Act, or the entries made in pursuance of it, let us consider the character of the entries I have noted.

It had been the law from the passing of the Act 59 Geo. III. c. 7 in the year 1819, that the treasurer should keep an account in which he should particularly enumerate every lot and should charge the same with or credit it for the amount of the taxes and rates payable or paid in respect thereof, for each and every year.

That Act was repealed in 1850, by 13 & 14 Vic. c. 66.

It is obvious that, if its directions were obeyed, there must have been another book than that produced to us. The evidence of Mr. McDonald, given in explanation of the book produced, seems to be that the system pursued was to leave the columns blank to indicate that the taxes were charged and unpaid; and then, when the taxes were paid, to make an entry. He evidently means such an entry as

"Psh," or "Pd," which appears in some places of the book. But in this way the book never showed the amount.

This system was followed up to 1850, when Mr. McDonald says they got a new set of books. The only book, however, produced is the old one. The entries of £1 0s. 3d. in the column of 1850, whatever they meant, were apparently made after the change of system.

The further examination of the book, which I have to refer to farther on, shews that those figures were acted upon as meaning that the north and south halves of the lot were separately assessed, each for £1. 0s. 3d.; but it is not shewn how or when the division into north and south halves took place for taxation purposes, though there is evidence of the separate occupation of the north half while the south half remained unoccupied. We are also left to conjecture how the £1. 0s. 3d., assuming it to be intended to indicate arrears of taxes, was made up, while it is evident it cannot have been for one year only.

The Act of 1850 made it the duty of the proper clerk to furnish the treasurer of the township, village, or town, or the chamberlain of the city, with a correct copy of each collector's roll so far as it related to the lands of non-residents; and required the treasurer or chamberlain to enter the same in a book to be kept by him for that purpose, together with the taxes charged upon such lands.

It did not contain any enactment expressly requiring the county treasurer to enter in his book the *arrears* on particular lots; but it imposed duties upon him which could not be performed without keeping some such record. Thus sec. 42 required the collector to deliver to the county treasurer an account of the taxes remaining due on his roll, and which he was not able to collect. Sec. 45 charged him with certain duties connected with the collection of the arrears; and sec. 48 provided for his issuing a warrant to the sheriff, within thirty days after the collector made his return, to levy on the lands of non-residents for the amount of the taxes then remaining due thereon with his costs.

Sec. 46 required the county treasurer to make a list of lands and arrears of taxes on them up to the first day of January, 1851, when the Act of 1850 came into force, and directed that those arrears should be certified to the clerks of the proper localities, and added to the rolls for 1851, and collected with the taxes of that year.

This provision gives probability to the theory that the entry of £1. 0s. 3d. in the 1850 column, was a memorandum of the arrears, made up from whatever data then existed, for 1850 and the three preceding years.

So far, the entries, although not very clearly explained, shew, I think, with sufficient *prima facie* certainty that the south half of the lot was returned by the collector as in arrear for $\frac{5}{6}$ for 1852, and for $\frac{7}{3}$ for 1853; but I do not think the evidence up to this point sufficient to shew that any tax, prior to 1852, was in arrear.

The memorandum, if the entry of £1. 0s. 3d. was a memorandum of arrears, not being an entry required to be made in the discharge of the treasurer's duty, has of itself no effect. We shall find, however, that a new significance attaches to it when we pass on to consider the Act of 1853.

Sec. 51 of that Act required the treasurer on the first of May in every year to complete and balance his books by entering against each parcel of land the arrears, if any, due at the last settlement, and the taxes of the preceding year which remained unpaid; and to ascertain and enter therein the total amount of arrears, if any, chargeable upon the land at that date.

Sec. 53 enacted that at the balance to be made on the first day of May in every year, if it should appear that there was any arrear of tax due upon any parcel of land, the treasurer was to add to the whole amount then due ten per cent. thereon.

Now, looking at the book, we find that the treasurer, in December, 1853, notes as due on the south half £1. 13s. 0d., which is obviously composed of the three sums £1. 0s. 3d., $\frac{5}{6}$ and $\frac{7}{3}$. He notes also, as due on the north half,

the £1.0s. 3d. only, there having been no intermediate entries of arrears against that half of the lot. Then to each of those sums he adds the ten per cent. and carries the amount forward. We are only concerned in tracing the south half. To the item of £1. 13s., we find added $\frac{3}{3}$, making £1. 16s. 3d., which is carried forward; and under date May, 1854, the non-resident tax for 1854, viz., $\frac{6}{5}$, is added, and the sum again carried forward as £2. 2s. 8d., which, with another addition of ten per cent., or $\frac{4}{3}$, makes the aggregate of £2., 16s: 11d., for which the half lot was sold.

I do not see any escape, consistent with established principles of evidence, from the conclusion that the entry of £1. 13s. 0d., and the subsequent entries, being made in performance of an express statutory duty; and made at the time when we must assume the means of ascertaining all the facts existed; and by the person who, besides being designated by statute, was himself familiar with the matter, must be taken *primâ facie* to shew that those amounts were in arrear; and they included taxes which went at least as far back as 1850.

I was for a while inclined to think that the absence of any entry under date of 1851, indicating, as it does, when read by the light of sec. 42 of the Act of 1850, that the taxes had been paid to the collector, who had therefore not returned the lot as in arrear, coupled with sec. 46 of the same Act, which required the arrears to be collected along with the taxes of 1851, led to the presumption that all arrears to that date had been paid; but, having regard to the directions of the Act of 1853, as to bringing forward the arrears; and to the express power given by sec. 62 to collect, under that Act, arrears which might have been collected under the Act of 1850, I am of opinion that the computation and entry of the £1. 13s., under the circumstances I have already dwelt on, outweighs any inference indicated by the negative evidence of the absence of the entry in 1851.

My conclusion thus adduced from the evidence, that there were taxes in arrears for five years, by reason of

which the land was, under sec. 55 of the Act of 1853, liable to be sold for taxes, makes it unnecessary for the decision of the case to consider whether the effect of sec. 155 of the Assessment Act of 1869, is to validate a sale for taxes which may not have been in arrear for the period necessary to render the land liable to be sold.

We have been referred to several cases in which that subject was in question.

Proudfoot v. Austin, 21 Gr. 566, was a case in which the plaintiff, relying on a tax deed, had given no evidence that any taxes were due. It was held by Blake, V. C., that sec. 155 only applied when there was an arrear of taxes at the time of the sale; that the plaintiff should have shewn that at the time of the sale there were some taxes due, and that an actual sale did take place; and that on proof of those facts he was entitled to the decree he asked. The necessity for proving five years' arrears does not seem to have been contended for.

In *Hamilton v. Eggleton*, 22 C. P. 586, it appeared that a sale had taken place when no taxes whatever were in arrear. The decision was, that that sale was not cured by sec. 155. Gwynne, J., giving the judgment of the Court, uses language which seems to intimate an opinion that while there must be some arrears to give the section operation, the arrears must be such as would render the land liable to be sold.

In *Austin v. Armstrong*, 28 C. P. 47, there is again an intimation of the same opinion. At p. 52, Gwynne, J., said, "It was also objected that no part of the taxes were due for five years. The writ was issued in July, 1858. There was no proof at what time in 1853 the assessment was made, and we cannot, in the absence of evidence, infer that it was within five years preceding the issue of the writ, in order to make void the sale."

In *Kempt v. Parkyn*, 28 C. P. 123, it was expressly held that the 155th section did not apply to cases where in fact the land was not liable to be sold by reason of no part of the tax having been in arrear for five years before the treasurer's warrant issued.

I do not wish to throw any doubt upon the construction thus put upon the clause in the Common Pleas, although I might have had some hesitation in arriving independently at that reading of the words, "sold for arrears of taxes." I see nothing objectionable in principle, nor anything unreasonably restrictive of the beneficial operation of the clause, in holding that while it cures defects in procedure, either in the formal assessment of the land or the steps leading to and including the sale, its operation is excluded when it appears that the substantial basis of liability, viz., the fact that a portion of the tax on the land had been overdue for the period prescribed by the law under which the sale took place, is wanting. In *Hamilton v. Eggleton*, 22 C. P. 546, it was shewn that no taxes were due; in *Kempt v. Parkyn*, 28 C. P. 123, it was shewn that none were due for five years; and in *Austin v. Armstrong*, 28 C. P. 47, the doctrine is acted on that there being *primâ facie* evidence of the arrears, it must be shewn affirmatively that the arrears did not extend far enough back to authorize the sale. In the present case there has been no attempt to shew that the £2. 6s. 11d., for which the land was sold, did not include five years' taxes. The contention has been that the tax title can only be upheld by proving that five years' were included. I am not disposed to adopt that view. I think that, arrears being shewn, the case is *primâ facie* within the statute, though it is competent to shew that the arrears were not such as to authorize the sale.

At the same time I am of opinion, for the reasons I have given, that there is direct evidence of the five years' arrears.

An argument has been rested on the evidence that, on 2nd March, 1857, money was tendered to redeem the land, which the treasurer refused to receive, because more than a year from the sale had elapsed. It is urged that at that time the sale was invalid, and therefore the tender prevented the operation of sec. 155. The point is not the same as that discussed in *McDougall v. McMillan*, 25 C. P. 75, and there is no ground for it.

If the tender had been within the year, the treasurer

would have been bound to accept the money, and the statute would have given effect to the payment or tender by avoiding the sale. When the tender was made, the only effect of it could be that, treating the taxes as due and the land as unsold, any subsequent sale for those taxes would have been illegal. No subsequent sale took place. What the statute has done is to make good the original sale.

In my opinion the appeal must be dismissed, with costs.

Appeal dismissed.

WAMBOLD V. FOOTE ET AL.

Promissory note—Guarantee—Statute of Frauds.

Held, affirming the judgment of the County Court, that a guarantee that a promissory note made by another will be paid at maturity is within the 4th section of the Statute of Frauds, and therefore invalid unless in writing.

APPEAL from the County Court of the County of Bruce.

The declaration alleged, that in consideration that the plaintiff would deliver to the defendants a horse in exchange for certain promissory notes, of which they were the holders, the defendants warranted that the makers of the notes were good and responsible, and that the same would be paid at maturity; and charged that the makers were not good or responsible, and that neither of the notes had been paid.

At the trial it was shewn that the transaction between the parties was an exchange of the horse for two promissory notes belonging to the defendants, but there was contradictory evidence as to the conversation between the plaintiff and defendant Briggs at the time the bargain was effected.

There was no distinct or satisfactory evidence of the circumstances of the makers of the notes at the date of the

bargain, and the plaintiff seemed to rest his right to recover upon the non-payment of the notes.

It appeared that the plaintiff had asked the defendant Briggs, with whom alone he had communication, to endorse the notes, which he pointedly refused to do; and, according to the plaintiff's own statement, the defendant was so far from saying that he would become responsible, that he remarked he might as well give his own note, which he declined to do, and that he wished to give the plaintiff the notes in question and "pay as he went along." The plaintiff, however, swore that the defendant said he would guarantee the notes, and the learned Judge, being apparently of opinion that there was some evidence fit to be submitted to the jury, left it to them to find whether there was any warranty in the words of the declaration. The defendants' counsel had objected that the alleged warranty was invalid, because by the Statute of Frauds it was required to be in writing, and leave to enter a nonsuit was reserved. A verdict having been found for the plaintiff, the learned Judge in the ensuing term made absolute a rule for a nonsuit, from which decision the plaintiff appealed.

The case was argued on the 15th of March, 1878. (a)

M. C. Cameron, Q. C., for the appellant. The case of *Eastwood v. Kenyon*, 11 A. & E. 438, shews that it was not necessary for the representation in question to be in writing, as it does not fall within the Statute of Frauds. It was not a guarantee that the appellant would answer for the default of the makers, but merely that they were able to pay.

Ferguson, Q. C., for the respondents. The jury found that the appellant warranted that the notes would be paid at maturity. The promise to be implied from such a warranty was that he would pay if the makers did not, and this is clearly within the Statute of Frauds. He cited *Mayer v. Isaac*, 6 M. & W. 605; *Brown v. Batchelor*, 2 H. & N. 255; 1 Wms. Saunders, 228; *Leake on Contracts*, 2nd ed., p. 139.

(a) *Present*.—MOSS, C. J. A., PATTERSON, and MORRISON, JJ. A.

March, 23rd, 1878. Moss, C. J. A. (a)—The question in this case is, whether the plaintiff is entitled to recover without proving an agreement in writing. I have no doubt that the learned Judge arrived at a perfectly correct conclusion. The only part of the declaration which upon any construction of the evidence the jury could possibly find to be proved, is that the defendants warranted that the notes would be paid at maturity, and that they were not in fact paid. It appears to me that there cannot be a clearer case of a guarantee falling within the fourth section of the statute. It is distinctly a collateral engagement to answer for the debt or default of another person, who was about to become liable to the plaintiff as holder of the notes, and who was to be the only person originally liable. The defendants were under no liability to the plaintiff, except such as grew out of this independent promise. The rule of law is succinctly stated in the last edition of Chitty on Bills. p. 186.

“Sometimes, on the transfer of a bill or note, a party may object to indorse it, but may yet be willing to guarantee the payment thereof. And this engagement, being within the Statute of Frauds, as an engagement to answer for the debt, default, or miscarriage of a third person, must be in writing; although it is no longer necessary that the consideration for the guarantee should appear in, or by necessary inference from, the document itself.”

Since the argument I have found two cases, which prove that this doctrine has been acknowledged in our Courts. In *Lock v. Reid*, 6 O. S. 295, the guarantee, although in writing endorsed upon the note, was held insufficient to satisfy the statute, because it did not shew a sufficient consideration. The head note states that a guarantee endorsed on a promissory note at the time of its execution in the following words, “We guarantee the payment of the within note,” does not shew a sufficient consideration for the promise, the case being within the Statute of Frauds.

This appears to be in entire accordance with the language used by Robinson, C. J., “We have no doubt that this

writing endorsed on the note, whereby the defendant simply engaged to guarantee the payment of it, does not import on the face of it a consideration, such as is necessary to give it validity under the statute as an agreement to pay the debt of another."

In *Palmer v. Baker*, 23 C. P. 302, the objection of the statute failed, because it was held that the writing was sufficient to satisfy its requirements, but the case was dealt with as clearly falling within the fourth section.

I may add that there is an excellent discussion of the law relating to guarantees of negotiable instruments, as distinguished from endorsements, in Story on Promissory Notes, 3rd ed. (Sections 454, *et seq.*)

The present case is entirely distinguishable from one in which the question is whether a debt is to be considered as paid by the debtor delivering to his creditor a promissory note or a bill of exchange. In such a case it depends upon the special circumstances, as Lord Langdale explains in *Sayer v. Wagstaff*, 5 Beav. 415, 462, whether the original liability is discharged. Here, there is no room for the contention that the defendants purchased the horse at a certain price and delivered the notes to the plaintiff on account.

The appeal must be dismissed, with costs.

PATTERSON, and MORRISON, J J.A., concurred.

Appeal dismissed.

CRAIG ET AL. V. CRAIG.

Easement—Specific performance—Evidence.

An agreement to grant an easement will not necessarily be for an easement in perpetuity.

Specific performance of an agreement to grant an easement may be enforced in equity.

A verbal agreement was entered into between the owners of two adjoining half lots, that each should give a strip of equal width from his land for a lane from the public highway to the clearing, which they should make upon their respective lots, the agreement not being expressly limited as to time. A rail fence accordingly was built by each on their respective sides of the lane, which they used in common for fifteen years, until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greatest part of the lane was on the defendant's land; and that there had been no expenditure on the plaintiffs' land, or on the lane upon the faith of this agreement.

Held, reversing the decree of Proudfoot, V. C., 24 Gr. 573, that specific performance could not be enforced, as the site of the fence and the user of the included land could not be referable to the original agreement; but even if the lane had been formed of equal portions of the land of each party, no agreement to keep it open in perpetuity could, under the circumstances, be presumed,

Quære, whether the defendant's agreement could properly be said to be founded upon a valuable consideration.

Leave to adduce further evidence refused, where the expense would be wholly disproportionate to the value of the subject matter in litigation.

THIS was an appeal from a decree of Proudfoot, V. C., granting an injunction to restrain the defendant from closing up a portion of a lane situate on his land, reported 24 Gr. 573. The facts are fully stated there, and in the judgment on this appeal.

The case was argued on the 4th January, 1878. (a)

T. Ferguson, Q. C., for the appellant. There is no sufficient evidence of the agreement which the respondents seek to enforce in this suit. The only evidence of any such agreement consisted of statements made by the late Alexander Craig to his wife, who admits that she knows nothing about the matter in question except what her husband told her, and it is submitted that such evidence is not admissible against the defendant. Where it is sought

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, JJ. A.

to take a parol agreement out of the Statute of Frauds, the evidence must be so strong as to satisfy the Court that there was such an agreement, and the acts of part performance relied on must be referable alone to the agreement which is attempted to be enforced.

In this case, however, any evidence given on the part of the respondents is consistent with our contention, that the lane was only opened for the temporary convenience of Alexander Craig and the defendant, and that either party was to have the right to close it up. The learned Judge treated the defendant's statement that the lane was made by mutual agreement as an admission, but rejected his statement that it was only for the time, and that there was no agreement that it should always remain open. But we contend that the whole statement should have been received, and that it was not competent to use one part and exclude the other part. The evidence shews that the lane in question is not in accordance with the alleged agreement, inasmuch as a larger portion of it is on the appellant's land than on the respondents'. Moreover, it is not attempted to be urged here that there were any improvements made on the respondents' property on the faith of this lane being kept open. He referred to *Young v. Wilson*, 21 Gr. 144; *Harris v. Smith*, 40 U. C. R. 33; 36 Vic. ch. 10, sec. 6, O.

Boyd, J. Q. C., for the respondents. The learned Judge who tried the case rightly found that the agreement was proved. The evidence of the appellant that the lane was merely temporary was an afterthought, not set up in his answer, and was negatived by him subsequently in his deposition, when he admitted that the lane was to remain open "as long as it was required," and that nothing was ever said at the time of the agreement, or afterwards about closing it. An agreement to make and use the lane being proved, the acts of the parties were a specific performance of the agreement; and a slight variation of the lane, as laid out and fenced in on each side, from the correct boundary line, even if proved, will not

invalidate what was done and acted on by both parties. The cases shew that where running powers are given over railways and no time is limited, they are held not to be determinable at will. In the same way an agreement for a lane should be held to be for a lane in perpetuity. He referred to *Llanelly Railway and Dock Co. v. London and North Western Railway Co.*, L. R. 7 H. L. 550; *Wood v. Hewitt*, 8 Q. B. 913; *Winter v. Brockwell*, 8 East 308; *Rerick v. Kern*, 14 Sarjeant & Rawle 267; *Radclyffe v. The Duke of Portland*, 7 L. T. N. S. 126; *Hervey v. Smith*, 22 Beav. 299; *Mold v. Wheateroft*, 27 Beav. 510; *Cotching v. Bassett*, 32 Beav. 101; *Bernard v. Gibson*, 21 Gr. 195.

March 30th, 1878. (a) Moss, C.J.A., delivered the judgment of the Court.

After anxious consideration, we are obliged to come to the conclusion that this decree cannot be sustained. As a matter of feeling we might have preferred a different result, for we cannot help thinking that the defendant has not shewn that spirit of kindness toward the widow and children of his deceased brother which might have been expected; but the extent to which he should be guided by such a sentiment is a question for the defendant's own consideration.

The decree complained of declares that the lane or road between the east half and the west half of lot No. 19, in the sixth concession of Brant, is an easement appurtenant to the east half, and that the plaintiffs, their heirs and assigns, are entitled to an unobstructed right of way in common with the defendant, his heirs and assigns, over the said lane or road for persons, horses, &c., and all other things whatsoever, and awards an injunction against any obstruction by the defendant.

The deceased, Alexander Craig, and his brother John, the defendant, jointly entered into possession of lot No. 19, about the year 1857. The lot was then unpatented and

(a) *Present*.—MOSS, C. J. A., BURTON, PATTERSON, and MORRISON, J. J. A.

wholly covered with woods. Alexander Craig agreed to purchase from one Robert Foster, who was the original locatee of the crown, his right and interest in the lot ; but there was an agreement or understanding between the brothers that Alexander should ultimately have the east half and John the west half. At this time John had no means of his own, and Alexander but little. Alexander was the elder, and made the payments to Foster, although they seem to a certain extent to have combined their labors. Subsequently the defendant paid Alexander one half the purchase money paid to Foster, with interest, and on the 13th of February, 1868, received from him an assignment of his interest in the west half of the lot, under which the patent was issued to the defendant, on the 16th of June, 1875.

The bill is framed upon the theory of the existence of a partly performed agreement for the establishment and maintenance of a road or lane from the public highway back into the clearings which they should make upon their respective lots. It alleges that about the year 1861 it was verbally agreed between Alexander Craig and the defendant that Alexander should leave a strip of land from front to rear, one rod wide, along the whole west side of his half of the lot, and that the defendant should leave a like strip of land, open from the front to the rear, of the same width, along the whole east side of his half of the lot, adjoining the strip to be left by Alexander, and that these strips should be used in common as an alley or lane for the joint use of both and their heirs, and for the joint benefit of the half lots and the owners and occupiers thereof. It then alleges that, in pursuance of this verbal agreement, each of them did leave a strip of land for the lane; and as they cleared from the front they cleared the lane, and each of them put a fence along the side of it, and fenced it off from their respective parcels ; and that this lane, so far as the same had been cleared, was mutually kept open and fenced ever after, and used as a means of ingress and egress, without any objection, until after the death of Alexander Craig.

There is no averment that Alexander Craig made any expenditure upon his own land or upon the lane on the faith of this agreement. The case made simply is that of a parol agreement by each to set apart an equal strip of his land for a lane in perpetuity, the putting up of fences in pursuance thereof, and undisturbed use for fifteen years. The defendant, while stating that a lane was opened on or about the division line between the half lots for the mutual convenience of himself and his brother, denied that there was any agreement that it should remain open for ever, to be used in common and for the joint benefit of the half lots, and the owners and occupiers thereof. He also objected to the sufficiency of the allegations to entitle the plaintiffs to specific performance, and claimed the protection of the Statute of Frauds.

It thus appears that the plaintiffs do not, by their pleading, invoke that branch of jurisdiction under which the Court enjoins a person who has acquiesced in the expenditure of money, or the doing of acts of an onerous character, from afterwards asserting his legal title to the prejudice of the person who made the expenditure or did the acts in the reasonable and honest belief that his right to the easement was not disputed or would be assured. If such a case had been made by the bill, we do not think it would have been supported by the evidence. We agree with the learned Judge in the opinion that the small expenditure of labour in draining and making a causeway over the lane was not "of sufficient importance to rest the right upon." Slight as the evidence on that point confessedly is, it might have been wholly displaced if the plaintiffs had, either originally or by amendment at the hearing, put forward such a case. We are the more impressed with this view because at the opening of this appeal the defendant's counsel applied for leave to adduce further evidence for the purpose of shewing that the statement of the widow, from which the learned Judge inferred that access cannot now be had from the plaintiffs' house to the concession road, without cutting up their orchard, is wholly incorrect.

We refused this application, partly because the plaintiffs desired, in the event of its being granted, to produce further testimony on their part, and this opened up a prospect of expense so wholly disproportionate to the trifling value of the subject matter of the litigation, that we thought, in the exercise of a sound discretion, it should be closed at once, and the parties left to their rights, whatever they were, upon the case as it actually stood.

If a valuable stone fence had been built by Alexander Craig upon his side of the lane, there might have been some plausibility in the attempt to invoke the aid of the Court on the ground of acquiescence in expenditure, but that would be an extremely slender equity which was built upon the placing of an ordinary rail or brush fence in that position during the clearing of the land.

It is perhaps scarcely necessary to remark that we agree with the opinion of the Vice-Chancellor, that it is a settled doctrine of the Court that specific performance of a contract to grant an easement may be enforced. Equity will treat a complete and sufficient contract as equivalent to the grant which the common law requires. Without accumulating authorities, it is sufficient to refer to *Hervey v. Smith*, 22 Beav. 299, which was commented upon in the argument. There, the owner of property, for valuable consideration, sold to his neighbour the right of using two flues in his wall. For eleven years these were used without any disturbance, although no grant had been executed. The defendant bought the servient tenement without actual notice, but he was held to be affected with constructive notice of the right, because there were fourteen chimney pots in the wall, and only twelve flues in the house he purchased. The Master of the Rolls observed that it is true that a right of way or other easement over the land of another cannot legally be granted without some instrument in writing; yet where an easement is sold by the owner of the land and is enjoyed for years, a Court of equity would hold that the agreement had been performed in every part except the conveyance, and would

not allow it to be recalled by the original grantor, or any person claiming under him, unless he made out t^hat he was a purchaser for value without notice.

But we apprehend that it is equally clear that the Court applies to a parol agreement for the acquisition of an easement the leading rules which have been established with regard to a parol agreement relating to interests in land generally. Firstly, in order to exclude the Statute of Frauds there must be acts of part performance unequivocally referable to the alleged agreement. Secondly, there must be satisfactory proof of the terms of the agreement. And lastly, the agreement must be founded upon a valuable consideration.

In this case it is difficult to perceive that the acts of part performance can fairly be said to be unequivocally referable to the agreement of which specific performance is sought. That agreement, according to the allegation which the plaintiffs attempted to sustain, is that Alexander Craig and the defendant should each give a strip of equal width from his land for the formation of the lane. Now, the acts of part performance relied upon are the placing of the respective fences in certain positions, and the user of the included space for the purposes of a lane. It is proved that these fences, instead of being equi-distant from the boundary, are so placed that by far the greater part of the actual lane is on the defendant's land. How then can the site of the fences and the user of the included land be properly said to be unequivocally referable to an agreement for the establishment and maintenance of a lane composed of equal portions of the land of each proprietor? These acts *per se* would point to some agreement by which the defendant was to give a larger portion of land than his brother. If it were necessary to the decision of the case, we should have thought it proper to consider whether the acts relied upon were of such a character as to render parol evidence admissible, notwithstanding the statute. But this question was not discussed at the bar, and, while not pronouncing any opinion upon it, we do not desire by passing it, *sub silentio*, to be under-

stood to assent to the sufficiency of the part performance, even if the lane had been opened and used with the boundaries assigned to it by the alleged agreement.

But even if parol evidence were admissible, we cannot concur in the conclusion that the evidence adduced was sufficient. The agreement to be proved was one by the defendant to set apart a portion of his land in perpetuity for a lane; and we treat this branch of the case as if the lane actually used had been taken equally from each half lot. It is indisputable that the lane was fenced off under *some* agreement or understanding between the parties. It is not, and could not be, pretended that either acted independently of the other. But the question is, whether it is proved that there was an agreement that the lane should continue for ever. Apart from the defendant's own statement, to which we shall presently refer, there is absolutely no evidence of such an agreement. The testimony of the widow may be dismissed at once, for she never heard her husband and the defendant talk about the lane, and her ideas of the nature of the agreement were gathered from statements made to her by her husband. She never heard her husband say anything about the lane in the defendant's presence, and never herself had any conversation with him upon the subject. Indeed her statement rather militates against the notion that there was any definite and concluded agreement respecting the lane, for she says "there was always a dispute." Without spending time in analyzing the rest of the meagre evidence offered for the plaintiffs, it is sufficient to say that in our opinion it proves no more than that there was a lane, that it had been made by the defendant and his brother jointly, and that each claimed to have as good a right to it as the other. All this certainly proves no more than the undisputed fact that there was a lane kept open by mutual agreement.

But it is urged that an agreement for a lane implies that it is to be in perpetuity. No express authority for this proposition is cited, but reliance is placed upon the general principles of construction enunciated in *The*

Great Northern R. W. Co. v. The Manchester, &c., R. W. Co., 5 DeG. & S. 138, and *Llanelly Railway and Dock Co. v. London and North Western R. W. Co.*, L. R. 8 Ch. 949. In the former case, where the question was, whether an agreement that each of two railway companies should interchangeably use the railway of the other company, upon certain terms, was determinable at will, the Vice-Chancellor said at p. 146: "If for valuable consideration a party says that another shall have the right of using a thing, a right in the nature of an easement, I think that *primâ facie* the inference to be drawn from that language would be, that it was not a mere license determinable at the will of the party who granted it." It was clear that the effect of the agreement was to leave the two companies permanently in a different position to what they were in before.

The analogy is rather remote between a contract of that description entered into by two railway companies, and an agreement between two brothers engaged in redeeming adjoining lots from a state of nature, that they will open a lane between their properties. In the latter case the question was, whether an agreement as to running powers, indefinite as to time, between two railway companies, upon the faith of which one lent to the other £40,000, was determinable at the will of the company which had received the money. In considering this question, Lord Justice James, at p. 949, used the language upon which stress has been laid: "I start with this proposition, that *primâ facie* every contract is permanent and irrevocable, and that it lies upon a person who says that it is revocable or determinable to shew either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination." This may seem to be a broad statement, but without questioning at present the perfect accuracy of the legal proposition enunciated by so high an authority, we have to enquire whether there is not to be found in the

nature of this contract itself an implication that it was not intended to be perpetual. Looking at the circumstances of this country, we are not prepared to affirm the doctrine, that, from the fact of two neighbours, while engaged in the work of clearing, having by mutual consent used adjoining portions of their land as a lane for any number of years short of the period prescribed by the Statute of Limitations, an agreement to keep it open in perpetuity should be inferred. Yet this appears to us to be the sum of the whole testimony produced by the plaintiffs, apart from the defendant's own statements. On these the learned Judge seems to have largely proceeded. He is reported to have said that the defendant admits that the lane was made by mutual agreement ; that he indeed says that it was *for the time*, and that there was no agreement that it should always remain open, but that this limitation required corroboration under 36 Vic. ch. 10, sec. 6, O. It is urged that the learned Judge thus treated one part of the defendant's statement as evidence, and rejected the other part. We apprehend that this is a mistaken view of the effect of his finding. We do not think that he can have meant any more than that the defendant's own statement did not prove that there was a positive agreement between him and his brother that the lane should be kept open for the time. With this conclusion, we think the whole of the defendant's statements taken together are quite consistent. We cannot suppose that the Vice-Chancellor intended to lay down the rule that when, in a suit to which the above mentioned statute is applicable, a party makes one whole statement, the part unfavourable to himself should be received as evidence against him, and the part favourable rejected, unless corroborated.

We are not prepared to accept without qualification the proposition that, as an agreement to sell land, without specifying the quantity of interest, is an agreement to sell the fee, an agreement for an easement is for an easement in perpetuity. The nature and character of the easement, the purposes which it is intended to serve, the relations of

the parties to each other, and other circumstances, may require to be taken into account. This may be illustrated by cases in which there has been an agreement for an easement to be enjoyed in connection with a business necessarily temporary in its nature, *e. g.* a right to pen back water for the purposes of a saw mill, which would necessarily cease to be used as the adjoining country became cleared. So if a gentleman, having rented for a short time a house and pleasure grounds, agreed with the owner in fee of adjoining property for a right of way over his ground to a point commanding a fine view, it could hardly be contended that because nothing was said as to the duration of the right, it was to be in perpetuity.

We think that the well established rule that a party seeking to enforce a parol agreement, notwithstanding the Statute of Frauds, is bound to prove its terms by clear and conclusive evidence, is sufficient for the disposition of this case. If we wholly exclude the defendant's testimony on his own behalf, the evidence given for the plaintiffs is not inconsistent with the defendant's contention that the lane was only to be kept open while that was mutually convenient.

We think that the evidence of the widow with regard to the planting of the orchard and the difficulty of access to the public highway is far too vague and unsatisfactory to be acted upon.

The effect of the decree complained of is practically to take from the defendant a part of his land, and we cannot think that it would be judicious or safe to permit this to be done on such loose and inconclusive verbal testimony.

These considerations render it unnecessary to examine the question whether the alleged agreement by the defendant can properly be said to be founded upon a valuable consideration. It is to be observed that this is not the case of a purchase of an easement for a sum of money, or some other thing of tangible value. The only consideration set up for the defendant's promise is the promise of Alexander. It may be asked, how was this promise to be enforced

against Alexander, and if not enforceable against him, how could it constitute a valuable consideration? Upon this point, which was not argued, we express no opinion, and simply refer to it in order that it may not be assumed that we hold a naked promise of that kind a sufficient valuable consideration for the purposes of maintaining a right to specific performance.

The appeal must be allowed, with costs, and the bill in the Court below dismissed.

Appeal allowed.

BOTHAM V. KEEFER.

Partnership—Jurisdiction of Court of Chancery—Declaratory decree.

Upon a bill filed by the plaintiff, as assignee of the firm of S. J. & Co., seeking to have the defendant declared a member of the firm, and to vest his property in the plaintiff, as such assignee, the Judge of the County Court of Brant, sitting for the Chancellor, made a decree as asked.

Objection to the jurisdiction of the Court of Chancery to entertain such a bill was taken for the first time in the reasons of appeal.

Held, varying the decree, that the Court of Chancery had jurisdiction under General Order 538 to declare the defendant a partner, as upon proof of the partnership the plaintiff could have asked to have the partnership accounts taken; but that it had no power to vest the defendant's property in the plaintiff.

Where there has been a contribution of capital as well as participation in the profits accruing from that capital, a partnership will be inferred, even though the parties have agreed that they will not call themselves partners, or did not intend to constitute that relationship.

Held, that the evidence, which is fully set out below, was sufficient to prove that the defendant was a partner of S. J. & Co.

This was an appeal from a decree of the Judge of the County Court of the County of Brant, sitting for the Chancellor.

The bill was by Thomas Botham, who described himself as assignee of the estate and effects of Samuel Scarlett, Thomas Johnston, and John McCulloch, both as individuals and as members of the firm trading in co-partnership under the name of Scarlett, Johnston & Co.

It appeared that on the 10th of May, 1877, a writ of attachment under the Insolvent Act of 1875 was issued, commanding the assignee in the usual form to attach the estate of Scarlett, Johnston, and McCulloch, but containing no reference to any partnership, beyond what might be implied from the conjunction of their names in the same process.

The bill alleged that the defendant was, at the time of the issuing of the attachment, a partner with these three persons in their business, although his name was not used in the style of the firm, and that his interest in certain lands should be made available to the creditors of the partnership.

The prayer was for a declaration that the defendant was a partner; for the vesting of his interest in the lands in the plaintiff as assignee in insolvency of the firm of Scarlett, Johnston & Co., and for consequential relief.

The gist of the answer was a denial that the defendant ever was, or agreed to become, a partner in the said firm, or responsible for its debts or liabilities.

The decree appealed from declared that the defendant was a member of the co-partnership of Scarlett, Johnston & Co., and ordered the estate and interest of the defendant in the lands described in the bill to be vested in the plaintiff as assignee in insolvency of the firm. It also directed a reference to the Master to enquire whether the defendant was entitled to any other property, and if any such property should be found, it was also vested in the plaintiff.

The other facts are stated in the judgment.

The case was argued on March 5th, 1878. (a)

M. C. Cameron, Q. C., (with him *A. Hoskin*,) for the appellants.

The Court below had no jurisdiction to make the decree in question. Any relief to which the respondent is entitled must be obtained through the medium of the Insolvent Court. The appellant has never been put into insolvency; and until the proper steps are taken against him under the Insolvent Act, the assignee of the firm of Scarlett, Johnston & Co., is not entitled to his estate.

C. Moss, for the respondent. It is now too late to object to the jurisdiction of the Court of Chancery to deal with this case, as the evidence shews that the respondent is the assignee of Scarlett, Johnston, & Co., and that the appellant is a member of that firm. If, however, the appellant was a dormant partner, as has been found, then inasmuch as such a case is not provided for by the Insolvent Act of 1875, the Court of Chancery has jurisdiction in aid of the insolvency proceedings. Under section

(a) *Present*.—*Moss*, C.J.A., *PATTERSON* and *MORRISON*, JJ.A.; *BLAKE*, V.C.

39 the assignee is invested with all the rights possessed by the creditors ; and since any creditor of the firm could sue the appellant, in order to prevent multiplicity of suits, the Court of Chancery has power to allow the assignee to file a bill vesting the appellant's property in him for the benefit of the creditors. Although as a rule the Court of Chancery will not interfere where the Insolvent Court has jurisdiction, still it has never admitted that its jurisdiction is ousted. At all events the bill can be maintained under G. O. 538, on the ground that it seeks to have the appellant declared a partner ; and it is only necessary to shew that the Court has power to grant consequential relief, which it clearly had in this case, to entitle us to a declaratory decree.

March 7, 1878, Moss, C. J. A.—We think the Court of Chancery had jurisdiction to make the decree.

The appeal was then argued on the merits.

M. C. Caméron, Q. C., (with him *A. Hoskin*,) for the appellant.

The evidence entirely fails to prove a partnership between the appellant and Scarlett, Johnston & Co. The appellant was not liable for the losses, nor was he entitled to a share in the profits. He was never held out to the world as a partner, and no creditor sustained any loss on the faith of his being connected with the firm. Being a practising barrister during the whole existence of the partnership he could not become a partner. His declaration that he would get some one to go in and provide him with a certain sum of money should not be construed to mean that he himself intended to be the real partner. The fact that McCulloch became the partner for all purposes is shewn by the articles of agreement. The warm interest which the appellant took in the firm can be explained on the ground that Scarlett was largely indebted to him, and that he was liable for a large amount of securities lent to the firm and on accommodation paper. It appears from the

evidence that it was never intended that he should become a partner, and all the authorities establish that under such circumstances no partnership is created. They cited *Ex parte Tennant*, L. R. 6 Chy. D. 353; *Pooley v. Driver*, 5 Chy. D. 458-474; *Kilshaw v. Jukes*, 3 B. & S. 867; *In re Randolph*, 1 App. R. 315; *Cox v. Hickman*, 8 H. L. C. 309; *Mollwo, March & Co., v. The Court of Wards*, L. R. 4 P. C. 535; *Bullen v. Sharp*, L. R. 1 C. P. 86, 125.

C. Moss, with him *Fitch*, for the respondents.

It matters not whether the appellant was known to be a partner or not, if in point of fact he was really so, and the evidence conclusively establishes that a partnership existed. All the requisites of partnership are found, and under such circumstances the case of *Mollwo, March & Co. v. The Court of Wards*, L. R. 4 P. C. 535, decides that the words used in the articles of partnership, or the intention of the parties are immaterial. But there can be no doubt upon a review of the evidence that a partnership was intended. The fact that the appellant was a member of the Law Society made it necessary for him to shield himself behind McCulloch; and his letters and conduct can only be understood on the supposition that he himself was the real, while McCulloch only the nominal, partner. The terms of the partnership were arranged before McCulloch was ever spoken to. No security was taken for the money advanced by the appellant to McCulloch, but in lieu thereof one third share of the profits which McCulloch was entitled to under the agreement was assigned to him. Then the appellant assisted the firm with money and accepted drafts from them; in fact the whole evidence irresistibly points to the conclusion that he was a partner.

March 30, 1878. (a) Moss, C. J. A., delivered the judgment of the Court.—Two questions are presented for decision upon this appeal. One is, whether the Court

(a) *Present*.—MOSS, C. J. A., PATTERSON and MORRISON, JJ. A.; BLAKE, V. C.

of Chancery had jurisdiction to entertain the suit; and the other is, whether the facts warranted a decree in the plaintiff's favour. The first point was not raised by the answer, or suggested at the hearing, where the contest seems to have been confined to the merits. It is, however, taken in the reasons of appeal, and must now be considered. We are all of opinion that so much of the decree as vests the defendant's lands in the plaintiff, and directs an enquiry as to other property owned by him, cannot be sustained. On the theory, which is of the essence of the plaintiff's case, that the firm, *quoad* creditors, consisted of the three other persons and the defendant, the plaintiff is not the assignee of the firm. He is only the assignee of three individual members of the firm. The property of the defendant, if he is a member of the firm, as the plaintiff alleges, is liable to the creditors of the firm, but not until his individual creditors have been satisfied. With no degree of propriety can the estate of an individual partner, who has not been placed in insolvency, be ordered to be transferred to the assignee of other members. Indeed, this enlargement of the relief to which the plaintiff conceived himself entitled was only sought at the hearing, when an order was made for the amendment of the Bill by adding a prayer that the lands should be vested in the plaintiff.

If the decree can be sustained, it must be solely on the ground that it was a proper declaratory decree for the Court to pronounce.

By the general order of the Court, upon which the jurisdiction in such cases rests, it is provided that no suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; but the Court may make a binding declaration of right without granting consequential relief.

This rule was adopted from the Imperial Act, 15 & 16 Vic. ch. 86, and the decisions of the English Courts upon its scope have been followed here. Their general effect has been to circumscribe very much the operation which the apparent generality of its language might seem, at first

sight, to suggest. It is well settled that the order does not extend to any case where the plaintiff would not be entitled to consequential relief, if he chose to ask for it; but if such relief might have been sought and given, the order does apply.

The rule was thus explained by Vice-Chancellor Strong in a case where a declaration of the true construction of a will was sought: "I think the case is within General Order 538, since the plaintiffs could have asked by way of relief consequential on the declaration, the administration of the estate, and in such a case the general order referred to applies." The question, therefore, is, could the plaintiff have asked for relief consequential upon the declaration that the defendant was a partner of the three persons of whom he is assignee in insolvency? If so, the order applies, and the Court might properly make the merely declaratory decree. I think there is no doubt that such consequential relief might have been asked. If the defendant is adjudicated a partner, the legal elements of the case are exactly the same as if A & B being partners, A is placed in insolvency, and his assignee files a bill against B, who denies the partnership. It is clear that by the attachment in insolvency the firm was dissolved, and the assignee became tenant in common with B of the partnership property; and it is quite settled that upon establishing the existence of the partnership he would be entitled to have the accounts of the partnership taken, and to receive the bankrupt's share, when ascertained.

These considerations seem to us to be conclusive as to the right of the Court to exercise its jurisdiction to the mere extent of declaring the defendant a partner. If the Court had the power, it can scarcely admit of doubt that this Court ought not now to interfere with its exercise, after all the evidence has been taken, the cause heard, and a decree pronounced without the objection being raised.

If there had been an absolute want of jurisdiction, we presume that the objection, although deferred until this late stage, must have prevailed; but we ought not, after so

much expense has been incurred, and after there has been a solemn adjudication upon the sole issue raised by the pleadings, to listen to the argument that the Insolvent Court is the more convenient forum for the disposition of such questions. We desire carefully to guard against the supposition that we are enlarging the boundaries of the jurisdiction of the Court of Chancery, or curtailing the functions of the Insolvent Court.

Our judgment does not shake in the slightest degree the authority of the cases in which the Court refused to interfere, when adequate relief could be obtained in the insolvency proceedings. We even refrain from expressing any opinion upon the course that it would have been proper for the Court to adopt, if this objection had been taken with reasonable promptitude. We go no further than to decline to hold that the Court was wrong in exercising a jurisdiction which it possessed, when the person complaining acquiesced in its exercise, and is only disappointed at the result. We think that every consideration of expediency, convenience, and justice, forbids the dismissal of the plaintiff without any consideration of the merits of the sole controversy which he and his opponent concurred in bringing before the Court.

Upon the merits, we entertain no doubt. We think that a perfectly clear case of partnership was established. There can be no doubt as to the conclusion to be drawn from the evidence adduced before the learned Judge who tried the cause. Indeed, the learned counsel for the respective parties did not materially differ in the views of the facts which they presented for our consideration.

It appears that the business in question was carried on by a firm called Builder, Johnston & Co., prior to the formation of the firm of Scarlett, Johnston & Co. According to the evidence of both Builder and Johnston, the members of this firm really were themselves and the defendant, although by the written articles McCulloch was ostensibly made the third partner. In the autumn of 1875, negotiations were entered into, principally between Builder

and the defendant, for the formation of a partnership to consist of Builder, Johnston, and one Samo. Before any arrangement was effected, the defendant, who is a barrister-at-law and solicitor in Chancery, stated that it would never do to have Samo in, and that he would go in instead; but he added: "I will send a man to represent me, as it would not be professional for me to go in personally." This statement, which was corroborated by other testimony, was credited by the learned Judge. An agreement seems to have been concluded in October, 1875, upon this basis, and according to the evidence of a solicitor, who acted for Builder, a rough stock list and memorandum of the terms of partnership were drawn up by the defendant, in which the names used were those of Builder, Johnston, and defendant. That neither Builder nor Johnston was looking to McCulloch as the incoming partner, is palpable from the fact that he was an entire stranger to both of them. It was not until after the business had been commenced and been in operation for five or six weeks, that McCulloch appeared upon the scene. This person had been in the employment of Samo, at Toronto, and manifestly was chosen by the defendant as his mere representative.

According to Builder the arrangement was that Johnston and Keefer were each to give \$3,000 for their respective shares in the business. On the 3rd of December, 1875, articles of co-partnership between Builder, Johnston, and McCulloch were executed, containing a stipulation that Johnston should give Builder \$3,000, payable at certain times, and that McCulloch should give and assign to Builder for his share and interest in the partnership a mortgage made by the defendant upon certain property in Strathroy. It was also provided that each of the parties should be entitled to draw out of the business the sum of \$1,200 per annum, in monthly payments, for his services, as if they were servants of the firm. The other stipulations seem to be such as we might reasonably expect in such an instrument, and there is no reference to the defendant except in the connection I have mentioned. Just

prior to the execution of this instrument the defendant had made a mortgage to McCulloch, securing the sum of \$3,000. It is not denied that this was so given in order that it might be assigned to Builder. Contemporaneously with the execution of the partnership articles a memorandum of agreement was drawn up between McCulloch and the defendant, by which the former acknowledged the receipt of the mortgage as a loan to enable him to enter the partnership of Builder, Johnston & Co., and in consideration of this loan agreed to pay the defendant as interest \$200 a year so long as he continued a partner in the firm, and also the full one-third share of all profits which he might from time to time become entitled to as partner, and he thereby assigned to the defendant all his accruing profits in the business absolutely, and agreed to account for the profits from time to time when required. He also agreed, in consideration of the said loan, in addition to the payment of the annual sum of \$200, and the profits of the business to be paid as interest, to pay the defendant by way of return of principal (instead of the sum of \$3,000), all his share and interest in the capital and profits of the co-partnership, as the same might exist upon dissolution. He also agreed, to give upon request full statements of the general management, position, and assets and liabilities of the firm, in order that the defendant might know how its business was progressing. Now what, disregarding the form, was the substance of this arrangement? Manifestly that the defendant was entitled to receive everything claimable by McCulloch under the partnership articles, except \$1,000 a year. The defendant, and not McCulloch, was the owner of the share in the capital, and of the profits, to which the latter was apparently entitled by the words of the instrument. As between themselves, McCulloch was no more than defendant's clerk or agent, at a salary of \$1,000 per annum. The position in which he was placed exactly accords with the oral testimony respecting the true character of the arrangement. Builder says that he had nothing to do with McCulloch as to the formation of the company, and that

the latter had nothing to say to it, all the business being done by the defendant. He expressly gives as the reason for defendant's name not appearing in the agreement, that he was to send McCulloch as his representative.

If I rightly understand Johnston's evidence, it was his expectation until the last moment, that the defendant would sign the agreement, and it was only upon receiving the assurance that it was all the same thing, that he executed the articles without defendant signing. Scarlett, who succeeded Builder in the business, as I shall have occasion to explain presently, swore that defendant told him, when inviting him to enter the partnership, that McCulloch "was his man who represented him in the business," and that "McCulloch was acting only for him," and that if he, Scarlett, wished to get rid of him, he was in a position to do so. Although it is urged that he modified these statements in cross-examination, there can be little room for doubt that the impression produced upon his mind by the defendant's acts and words was, that he was the real, and McCulloch only the ostensible, partner. The defendant denied that he had ever become, or intended to become, a partner. His version of the affair is, that he had been acting as solicitor for Samo and Johnston, and that in consequence of their place of business having been destroyed by fire, it became necessary to make some other arrangements, and they thought of taking a share in this business in which Builder was interested. Accordingly he went up to Brantford and made a report of the position of affairs, whereupon Samo refused to go in, but suggested that the defendant should become a partner, to which he replied that he could not, being a legal practitioner, but that he could lend the money to McCulloch to enter into partnership. He denied that he had ever told Builder or Scarlett that he would put in a man to represent him, and stated that his interest in the business was that defined by the written agreement between him and McCulloch. If the evidence had rested there, and the learned Judge had drawn the conclusion that the defendant was proved to be

a partner, we ought not to interfere. The evidence would have amply warranted his decision. It was a question of fact which the tribunal of first instance was peculiarly qualified to determine, and we ought to pay the greatest respect to its opinion. It is not necessary to question the sincerity of the defendant's statement that he did not intend to become a partner. But I think that this was in effect an attempt to secure all the benefits of being a full and active partner, and all the prospects of large profits from a manufacturing business, without incurring any corresponding liabilities.

But the evidence of the defendant's intimate connection with the business does not stop at this point. So soon as the early part of 1876, the other parties had, for some reason, become dissatisfied with Builder, and the defendant admits that he was anxious that that person should retire. Accordingly the defendant suggested to Scarlett that he should become a partner, and that he should contribute \$6,000 for one-third share in the business. In order to effect this, it was obviously necessary to purchase Builder's interest. The whole of the arrangements for Scarlett entering and Builder retiring from the firm seem to have been made by the defendant, without the interposition of McCulloch. In agreeing to embark in this enterprise, it was with the defendant alone that Scarlett dealt. The form in which the transaction with Scarlett was put was, that Johnston and McCulloch purported to purchase Builder's interest at a certain price, and then purported to sell one-third interest to Scarlett at a valuation.

Builder was to receive as the price of his interest in the old firm, \$8,879, of which the sum of \$5,379 was collaterally secured by a mortgage given to him by the defendant on certain freehold property. This mortgage is dated the 10th of May, 1876, but was not registered until the 16th of that month. The articles of co-partnership between Scarlett, Johnston, and McCulloch, are dated the 15th of May, 1876. Throughout all these transactions, the active management was assumed by the defendant. So little importance did

he attach to McCulloch's position, independent of himself, that he did not deem it necessary to make any new agreement with him, when the new partnership was formed, although the agreement under which he now seeks to shelter himself, only defines his rights during the existence of the old firm, and although he had incurred this large additional liability with a view to the creation of the new partnership. After its formation, the defendant went frequently to the place of business, looked over the books, and gave instructions for the collection of accounts. He aided the firm in raising money, and accepted bills to enable discounts to be obtained to the enormous amount of \$68,000. He used to get the paper discounted in Toronto, and forward the proceeds. He never kept any account of the liabilities which he thus assumed.

The correspondence of the defendant strongly supports the view of his position to which the preceding facts point. On the 8th of May, 1876, he wrote to Scarlett that he was at Brantford closing up the dissolution of Builder, Johnston & Co. His language is so significant that I read an extract verbatim :—

“The Bank of Montreal here discounted \$5,000 of your paper—all we asked them. The whole town, the banks, and all the customers are pleased that Builder is going out. I hope we will have no hitch now, as we are prepared to the letter, and his solicitor says he is also ready for Builder. When the dissolution is signed it would be well to start under the new name Scarlett, Johnston & Co. immediately after, to save opening two new sets of books, and especially with the bank, who have been so favourable to us on the expectation of your replacing Builder. I write to know how you are getting on, and if when dissolution is complete and everything satisfactory, as it probably will be to-morrow, I can at once announce your name as the new man in the business; and your share in the profits and interest in the business will commence from the change, which should be one of immediate succession. It will in no way interfere with the understanding between us as to the terms upon which you come in, and whenever you are ready stock will be taken and accounts made out, and everything faithfully and satisfactorily arranged.”

He adds, "I have great confidence in the concern when we get rid of our great nuisance, and substitute you," Builder being the person thus characterized.

On 30th May, 1876, he wrote to Johnston a long letter couched in terms which might well be used in a confidential communication between partners. For example he says: "My whole interests are now wrapt up in the welfare of your new concern, and I feel that after all the struggles we have had we will in time get our just reward. July and August will be our hardest months to get over." Again, speaking of Samo he says: "He is doing all he can to pay as much as possible, and at the same time wipe out the debts of the old composition notes; and there is no doubt it is our interest to keep him up and well supplied, to enable him to do this."

In writing to Scarlett on 31st May, 1876, he says, with reference to this banking account: "It is our interest to shew our independence as soon as possible, no matter if we have to sacrifice a little to do it at the start, for there seems to me no doubt that we will be abundantly repaid at the end of even the first year's business."

It is unnecessary to refer at greater length to the correspondence. It is sufficient to say that we cannot be surprised that the learned Judge found a difficulty in reconciling it with the contention that the defendant's interest was of the limited description now put forward. It was suggested that these letters might be explained by the position of the defendant as solicitor for the firms, and as a large creditor. This explanation is wholly inadequate. No one reading the letters fairly and candidly could accept that view of the relations between the correspondents.

There is one circumstance which seems quite irreconcilable with the idea that he was acting in the capacity of solicitor. By the terms of co-partnership of the legal firm, of which he was a member, he was entitled to one-third of the profits. Charges for professional services performed for Builder, Johnston & Co., were entered in the books of that firm, but when the accounts were being

rendered, the defendant deducted one-third of the charges. The obvious meaning of that was, that he neither claimed nor received personal remuneration for even his professional services.

It was strenuously urged that, notwithstanding all the dealings and transactions of the defendant, to which reference has been made, he was not a partner, because the authorities have now reduced this question to one of intention, and it is very certain that the defendant did not intend to make himself a partner, but on the contrary from the outset stated that his professional position prevented his doing so. I have already expressed the opinion that it is not necessary to dispute the defendant's assertion that he did not intend to become a partner in the sense of subjecting himself to the ordinary responsibilities of a member of the firm; but he must be taken to have contemplated the necessary consequences of his acts, and they were indubitably to make him a partner in all but the name. We had occasion in *Re Randolph*, 1 App. R. 315, to consider the cases which had then been decided upon the result of participation in profits, as constituting a person a partner. That subject has since been considered by Judges of great authority, but we do not find anything at variance with the views we expressed.

This, however, is a case resting upon entirely different principles. We there acted upon the doctrine that while participation in the profits was extremely cogent evidence of the existence of a partnership, it did not in itself create that relation, but that this inference was displaced, if it appeared from the agreement, and the whole of the circumstances, that no partnership or constitution of the relation of principal and agent between the person taking the profits and those actually carrying on the business was really intended. But, as my brother Patterson pointed out, if the evidence there had shewn that there had been a contribution of capital, and a participation in profits accruing from that capital, there would have been very conclusive grounds for holding that a partnership in fact existed, even

though the parties had agreed that they would not call themselves partners.

In the case of *Mollwo, March & Co. v. Court of Wards*, L. R. 4 P. C. 438, to which we then referred at some length in support of the view that the appellant was not liable, there is a passage which clearly shews the distinction between that case and the present. Speaking of arrangements for lending to a firm, it is observed : " If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability ; for the law in cases of this kind will look at the body and substance of the arrangement, and fasten responsibility on the parties according to their true and real character." The guise in this case was extremely transparent, and there is no doubt as to the body and substance of the agreement. The most that can be said is, that the defendant used every precaution that legal ingenuity could suggest to secure the advantages without incurring the responsibilities of a partner. This transaction was not less in substance one of partnership than that examined by the Master of the Rolls in *Pooley v. Driver*, L.R.5 Ch.D. 493, and I think that it may be fittingly described in the language which he applied to the position of the contributors to the business in that case : " It is an elaborate device, an ingenious contrivance, for giving these contributors the whole of the advantages of the partnership without subjecting them, as they thought, to any of the liabilities. I think the device fails; and that, looking at the law as it stands, I must hold that they are partners, and liable to the consequences of being partners, and to the whole of the engagements of the partnership, and consequently liable for the whole of its debts."

It was also contended before us that the effect of making the declaration complained of was to constitute a partnership of four persons, while, according to the plaintiff's now contention, McCulloch was never a real partner. The

answer to this is two-fold. In the first place, the objection does not lie in the mouth of this defendant. If McCulloch does not complain of being treated as a partner, it is no concern of the defendant's. And secondly, they may both be liable to creditors, although not partners *inter se*, the defendant by virtue of his real interest, McCulloch by virtue of his ostensible character.

Subject to the variation of the decree I have mentioned, the appeal must be dismissed, with costs.

Appeal dismissed.

WINGER V. SIBBALD ET AL.

Abandonment of part of claim—Effect of.

Held, reversing the judgment of the County Court, that the commencement of a suit in the Division Court for part only of an entire claim, and endorsing an abandonment of the balance on the summons, is not *per se* a release of the excess; but the part so abandoned cannot be sued for after the recovery of judgment in such suit.

This was an appeal from a decision of the learned Judge of the County Court of the County of York, sitting in insolvency.

The question raised upon the appeal was, whether the effect of certain proceedings, taken by the appellant in the Division Court, prior to the issue of the writ of attachment, was to reduce his claim against the respondents beneath the sum of \$200. The learned Judge was of opinion that this was the result of the proceedings, and accordingly, on the application of the defendants, made an order setting aside the writ with costs.

The facts appear in the judgment.

The appeal was argued on the 20th March, 1878, before Moss, C. J. A., sitting in insolvency.

F. S. Nugent for the appellant. The learned Judge set aside the writ of attachment herein on the authority of *Re McKenzie and Ryan*, 6 P. R. 325. It is submitted, however, that that case does not support the holding; and that the construction put upon it is a misinterpretation of the language used by the Chief Justice of the Queen's Bench, as the cases cited in connection with this part of his judgment, viz., *Bagot v. Williams*, 3 B. & C. 235; *Dunn v. Murray*, 9 B. & C. 780; *Vines v. Arnold*, 8 C. B. 632, and *Isaac v. Wyld*, 7 Ex. 163, were all cases which had gone to final judgment, whereas in the case in question the suit had simply been entered. The 60th section of R. S. O. c. 47, enacts that "a judgment of a Division Court upon a suit brought for the balance of an account shall be a full discharge of all demands in respect of the account," etc. And to hold that the mere entry of a suit shall have the force of a judgment would be to add a most important clause to this section, which the Legislature alone has power to do. Nor can the respondents rely on the common law to support their contention, as the appellant has not received any consideration for the part of his claim so abandoned, nor anything that could operate as an accord and satisfaction of his full claim; *Edwards v. Chapman*, 1 M. & W. 231; *Foster v. Dawber*, 6 Ex. 851; *King v. Gillett*, 7 M. & W. 55; *Harris v. Carter*, 3 E. & B. 559; *Cook v. Lister*, 13 C. B. N. S. 587; *Sibree v. Tripp*, 15 M. & W. 33. The fact that judgment was obtained by the appellant in the 10th Division Court, for the sum of \$95.57, cannot prejudice us, as the respondents applied for, and obtained a new trial with the consent of the appellant, prior to the issue of the writ of attachment, and these proceedings rendered the first trial, and the judgment obtained thereat, for all practical purposes, as if it had never been: *Macclesfield v. Bradley*, 7 M. & W. 570; *Hutchinson v. Piper*, 4 Taunt. 553; *Mahoney v. Fraser*, 1 Dowl. P. C. 703.

A. Monkman for the respondents. The appellant cannot

be considered a creditor having a provable claim of \$200 within the meaning of the Insolvent Act of 1875, inasmuch as by abandoning the \$221.68 in the action in the first Division Court, he forever lost that part of his claim. *McKenzie and Ryan*, 6 P. R. 325, is expressly in point. The learned Chief Justice of Queen's Bench uses the following language, which really decides this case: "If a man having a demand against another for a certain amount, properly the subject of one suit, sue in a superior court of law for an amount less than his whole demand, he thereby abandons the excess, and never afterwards can sue for the excess in any Court of Justice." When the appellant obtained judgment in the 10th Division Court, for \$95.57, the balance of his claim was thereby discharged; and he was no longer a creditor of the insolvent, having a claim sufficient to support a writ of attachment. If the Division Court had jurisdiction because the claim was less than \$100, it cannot be contended that the Insolvent Court has jurisdiction because the claim amounts to \$200 or over.

April 9th, 1878. Moss, C. J. A.—The facts admit of a concise statement. About the 1st of October, 1877, the appellant consigned to the respondents a quantity of butter for sale on commission. Sales were made, and portions of the proceeds applied by the respondents on the appellant's account. According to the allegation of the appellant the accounts of the respondents shewed that on the 22nd of October the balance due to the appellant was about \$236, and the respondents proceeded to make further sales, the proceeds of which, after proper deductions, amounted to \$67.63.

It does not appear to me that there is any satisfactory proof of a settlement of accounts in October. The respondents assert that the transaction was single and entire, resulting in a balance due to the appellant of about \$289. In the view that I take of the law, it is not material to scrutinize the statements of the parties. On the whole, I think that the respondents' version is the more probable,

and I assume its correctness. On the 22nd of December the appellant commenced an action against the respondents in the First Division Court of this County, upon which particulars are endorsed in the following form :

"1877—October 22. To balance of account	
to date.....	\$321 68
By amount abandoned.....	221 68
<hr/>	
Amount sued for.....	\$100 00."

Confessedly the abandonment of the excess was made for the purpose of giving the Court jurisdiction in compliance with the 69th of the Division Court Rules. On the 24th of December the appellant brought another action against the respondents in the 10th Division Court of this County, claiming to recover on the following statement of account :

"1877—Dec. 5. To amount of account	
from 22nd Oct. 1877.....	\$145 57
By cash on account.....	50 00
<hr/>	
	\$95 57."

Looking at the close proximity of the dates of issuing these respective writs, and other circumstances on which I need not dwell, I cannot but assent to the suggestion of the learned counsel for the respondents that the deliberate object of this procedure was to split up the appellant's demand. The first of these actions was never tried, but was withdrawn before the appellant sued out the attachment. The second proceeded to trial, and the respondents not having appeared, the Court gave judgment for the full amount claimed, although the appellant subsequently conceded that the balance should have been further reduced by certain counter-charges. The defendants, therefore, applied for a new trial according to the practice of the Court, and on the 8th of February an order for a new trial was made upon the consent of the plaintiff's attorney. It was insisted on argument that this order was absolutely void, or at least irregular, because on a preceding day, when the summons was returnable, the Judge had at the instance

of the defendant's attorney, plaintiff having failed to appear for the purpose of shewing cause, enlarged the summons until the first of March.

There are no materials before me from which I can gather this state of facts. Among the papers there is an affidavit by the defendant's attorney containing certain statements pointing in that direction, but the learned Judge has expressly noted that it was not used upon the argument before him, and it appears to have been filed subsequently. Even if it were before me, it would be quite out of the question for me to treat the order as a nullity. Such a contention is highly unreasonable and unjust. The defendants had themselves applied for a new trial. The plaintiff, having no opposition to make, did not attend when the summons was returnable. The defendants' proper course then was to have taken an order for the new trial, and if the Judge did then *per incuriam* enlarge the application until the 1st of March, I think he was quite right in setting aside the judgment and ordering the new trial when it was brought to his attention that the plaintiff had not intended to offer any opposition, and that the postponement had only been obtained to serve the defendant's own purpose.

But without discussing that question any further, it is sufficient for me to say, that there was an order for the new trial made by the Court having jurisdiction, and that there is no proof that it is either irregular or improper. Upon that order being made, the plaintiff withdrew the action, and gave notice of the withdrawal. He had previously procured the issue of a writ of attachment in insolvency against the defendants, but this was never acted upon in any manner, and having been abandoned, nothing now turns upon its existence.

On the 9th of February, after notice had been given of the withdrawal of the Division Court suits, the writ of attachment in question was issued. Upon the petition of the respondents this writ and the order upon which it issued were set aside on the ground that the appellant was

not a creditor to the amount of \$200 or upwards. The learned Judge seems to have proceeded on the view that the abandonment by the plaintiff of the \$221.68, endorsed on his summons in the First Division Court was final and irrevocable, amounting in fact to an absolute release of that portion of his claim. If that view be correct, the conclusion follows that the appellant is not a creditor to the requisite amount. But with great respect for the opinion of the learned Judge, I think he has proceeded under a misapprehension as to the law. It is said that he conceived himself bound to take this view by the language of the learned Chief Justice of the Queen's Bench in *Re McKenzie and Ryan*, 6 P. R. 325, where he is reported to have said: "If a man, having a demand against another for a certain amount, properly the subject of one suit, sue in a Superior Court of Law for an amount less than his whole demand, he thereby abandons the excess, and never afterwards can sue for the excess in any Court of Justice."

The learned Judge of the County Court seems to have considered this an expression of opinion that the commencement of a suit for a smaller amount is *per se* a final abandonment of the excess, and counsel has advanced it as authority for that proposition. I feel sure that the Chief Justice never intended to affirm such a doctrine. Some colour is perhaps afforded to this construction of his language by the apparent contrast which he draws between proceedings in inferior and superior Courts by the next succeeding passage in his judgment: "But the mere fact of suing for a portion of an entire demand in a Court of inferior jurisdiction is not *per se* an abandonment of the excess. Some *act* of abandonment of the excess on the part of the plaintiff would, therefore, appear to be necessary: *Isaac v. Wyld*, 7 Ex. 163."

It is strenuously argued that this proves that the learned Chief-Justice was of opinion that at least in the case of suits brought in the Superior Courts such is the rule. To this it is effectively answered that even if that were the reasonable construction of his language, he must

have thought that the rule did not extend to actions in Courts of inferior jurisdiction, and the action now under consideration was brought in such a Court. But I apprehend that what the Chief-Justice really meant was, that this consequence followed not from the simple fact of suing, but from recovering in the suit. With that qualification the statement is indisputable, and it was, no doubt, present to the mind of the Chief-Justice, for he refers to the cases of *Bagot v. Williams*, 3 B. & C. 235, and *Dunn v. Murray*, 9 B. & C. 780, in the former of which there had been a judgment recovered, and in the latter an award made for the smaller amount. In the former case the defendant expressly pleaded a previous recovery for the same cause of action. In the latter it was held that the claim was within the scope of the reference upon which the award was made; and that it was the duty of the plaintiff to have brought it before the arbitrator if he meant to insist upon it as a matter in difference.

The rule, as I understand it, is concisely stated in Mr. Chitty's book on Contracts: "If the plaintiff has sued the defendant in the County Court, and in order to bring the case within the jurisdiction of that Court has abandoned part of his claim, judgment recovered in that suit will be a bar to any action which he may bring to recover the part so abandoned." If the view taken by the learned Judge were correct, it must follow that the plaintiff, after commencing his suit with a notice of abandonment endorsed on his claim, could not afterwards have withdrawn the suit and commenced proceedings in the County Court. That position cannot be supported either on principle or authority.

The appeal must be allowed, with costs, and the petition of the respondents dismissed, with costs.

Appeal allowed, with costs.

RE ERLY, AN INSOLVENT.

Insolvent Act, 1875, secs. 70, 71, 72, 73—Cancellation of agreement for lease—Damages for.

One E. agreed to rent certain premises for ten years on condition that certain improvements were made. The agreement was evidenced by a letter from the landlord, to the terms of which E. assented. After the alterations were completed E. entered, and while still in possession under this agreement became insolvent. The inspectors cancelled the lease, and delivered up the premises at the end of the current year, whereupon the landlord claimed to be allowed damages under the 70th and three succeeding sections of the Insolvent Act, 1875.

Held, affirming the decision of the County Court Judge, that these sections are not limited to leases valid at law, but that they apply equally to leases valid in equity; that here the execution of a formal lease could have been compelled; and that the landlord was therefore entitled to prove for damages for the cancellation.

This was an appeal from a decision of the Deputy Judge of the County Court of the County of Frontenac, allowing the respondents to rank for damages for the cancellation of a lease.

The appellant was the assignee of the estate of Luke J. Erly, who, in August, 1876, agreed to rent certain premises from the respondents, W. R. McCrae & Co. The agreement was evidenced by a letter from the respondents to Erly, to the terms of which he gave an unqualified assent. By this letter they offered to rent the premises for \$375, for the first five years, and \$425 for the second five years, the store to be ready for occupation by the 1st of October, and rent to begin on the 1st of November, and contain shop-fittings to be erected by the respondents. Shortly afterwards, and before possession was taken by Erly, he rented from them the third story of the building at \$175 per annum, on condition of their fitting up an elevator. The shop-fittings and elevator were put up at considerable expense, and Erly entered into possession, but no formal lease was prepared or executed.

While still in possession under the agreement, Erly became insolvent, and on the 26th of June, 1877, the inspectors of his estate passed a resolution, of which the following is a minute: "The lease of the premises rented from Messrs. W. R. McCrae & Co.. was under consideration. It was

resolved that the lease referred to should be cancelled, and the premises surrendered at the end of the year now current, that is to say, on the 1st day of November next." Possession was given up by the assignee to the respondents in compliance with this resolution. The respondents having claimed to prove for damages under the 72nd section, the assignee contended that the Act only applied where there was a lease completely valid and effectual at law, and therefore resisted the claim.

The case was argued on the 26th February, 1878, before Moss, C. J. A., sitting in insolvency.

E. D. Delamere, for the appellant. The lease in question, being for three years and not under seal, is void both under the Statute of Frauds, and Con. Stat. U. C., c. 90, sec. 4. It merely amounted to a tenancy from year to year, which the assignee had power to put an end to by the notice which he gave; and the landlord was only entitled to damages for the second year of the tenancy. The learned Judge was wrong in holding that an agreement for a lease for ten years was proved; but even if such an agreement had been shewn, it cannot assist the plaintiff, as sections 72 and 73 of the Insolvent Act of 1875, are limited to leases valid at law, and do not include a mere agreement for a lease. He referred to *Burrowes et al. v. De Blaquiére*, 34 U. C. R. 498; *Osborne v. Earnshaw*, 12 C. P. 267; *Caverhill v. Orvis*, 12 C. P. 392.

D. O'Sullivan for the respondents. The Statute of Frauds does apply, as in this case there was ample evidence of part performance, the tenant having gone into possession and paid rent and being otherwise recognized as a tenant in possession under the lease. If the Statute of Frauds does not apply, neither does Con. Stat. c. 90, s. 4. There can be no such thing here as a presumed tenancy from year to year, as one year of the holding had not elapsed; it must be held to be either a lease for ten years or for one year. The agreement is a good equitable lease, which can be enforced specifically by either side; and the holding of the Court below, that the distinction between a lease and

an agreement for a lease ought not to be allowed to prevail, should be sustained. *Ex parte Llynvi Coal and Iron Company*, L. R. 7 Chy. 28, is in accordance with this view. He also referred to *Pain v. Coombs*, 1 DeG. & J. 34; *Clarke* on the Insolvent Act, 92.

April 9th, 1878. Moss, C.J.A.—The question raised upon this appeal, which is of some general importance, depends upon the construction to be placed on the 70th and three succeeding sections of the Insolvent Act of 1875. Under these sections the respondents claimed to be allowed damages, and the learned Deputy Judge of the County Court of Frontenac having decided in their favour, this appeal has been brought.

The learned Judge in effect held that the relationship between the respondents and the insolvent, was that of lessors and lessee within the provision of the Act, and allowed the claim. I think that his conclusion was perfectly correct. The appellant's contention is based upon the proposition that the attempted lease is void, because it is not under seal as required by Con. Stat. U. C. ch. 90, sec. 4, and that the relationship existing between the respondents and Erly at the time of the insolvency was only a tenancy from year to year. It was argued that this was not a mere agreement, but an attempt to make an actual demise in a manner not permitted by the statute. I think that the authorities are very clear as to the rights which a Court of law would recognize as growing out of this transaction. I have no doubt that the letters would be held to constitute an agreement and not a demise. That would probably have been the construction placed upon them before the statute, but since the statute, the cases, with the exception of *Stratton v. Pettit*, 16 C. B. 420, leave no room for doubt. Whether that case, coupled with the rules laid down under the old law, would have proved this to be an actual demise, it is quite immaterial to consider, for after having been virtually disregarded in several cases, it was distinctly overruled in *Tidey v. Mollett*, 16 C. B. N. S. 298, where

Erle, C. J., explains the change in the principles of construction which ought to be applied. He says, that although at one period the Courts strove to construe these documents to be present demises, yet, since the 8 & 9 Vic. ch. 106, (from which our enactment is taken) for the same reason the Judges will, if they contain words of agreement, construe them to be agreements only, and not demises—*ut res magis valeat quam pereat*. A similar view of the effect of the statute had been acted on in *Bond v. Rosling*, 1 B. & S. 371. In *Stranks v. St. John*, L. R. 2 C. P. 376, Willes, J., seems to treat it as undoubted law that a document which was void as a lease at law because it agreed to let premises for a term of seven years, and was not under seal, was, since the statute, valid as an agreement.

A question involving the application of closely analogous principles came before the Court of Exchequer in the case of *The Ecclesiastical Commissioners v. Merrill*, L. R. 5 Ex. 163. Corporate property had been demised to the defendant for a term of years, but there was no instrument under the common seal of the plaintiffs. The defendant agreed "to put and maintain the said premises in tenantable repair, both externally and internally, and so to deliver them up at the end of the said term." The defendant occupied during the term, and left without repairing. His contention was that he could only be sued for use and occupation on the footing of the contract created by his enjoyment of the property, but this was overruled. The Chief Baron said that the question was, whether, under the circumstances, a tenancy from year to year did not arise in the defendant, and if this were so, then whether the stipulation as to repairs is one properly incident to a tenancy of that nature. He referred to the case of *Mayor of Stafford v. Till*, 4 Bing. 75, as an authority to shew that where possession and enjoyment has been had under a lease which was originally void, yet an action may be maintained on an implied promise which arises on the whole transaction, and he expressed the opinion that the equitable obligation on the part of the plaintiffs to execute a lease, formed a sufficient consideration for the defendant's promise..

The same Court subsequently held in *Martin v. Smith*, 43, L. J. Ex. 42, that a person who enters a house under an unsealed agreement for a term exceeding three years, and occupies and pays rent until the end of the term, is, during the whole term, tenant from year to year, and liable to all the stipulations in the agreement which are applicable to such a tenancy. Accordingly he was held liable to be sued for a breach of a stipulation that he should paint in the last year of the term. Pigott, B., remarked that "The agreement was no doubt void at law as a lease, but the defendant had the benefit of the occupation for the whole seven years, and though he was only tenant from year to year during the term, yet he had the right in equity to have the agreement turned into a lease."

In the case now under consideration, there is no doubt that equity would, at the instance of either party, have supplemented the agreement by a lease valid at law. In view of *Cowen v. Phillips*, 33 Beav. 18, and *Parker v. Taswell*, 2 DeG. & J., 559, the learned counsel for the appellant properly conceded that he could not struggle against that conclusion.

From these considerations it is plain that in the eye of a Court of law there was an agreement between the respondents and the insolvent upon which an action might be maintained, and that the tenure was a tenancy from year to year, subject to all the stipulations applicable to such a tenancy, and indeed to all the stipulations, if there were possession and enjoyment for the whole period. In the eye of a Court of Equity, looking upon that as done which ought to be done, the relationship of landlord and tenant for a term of ten years was as effectually created as if there had been a demise under seal. Nothing was wanting but the form of a deed, the execution of which would have been decreed as of course. That being the situation of the parties, the Court ought to struggle against that narrow construction of the Insolvency Act, which would deprive the landlord of the compensation to which he would have been entitled if a formal instrument had been exe-

cuted. I do not think that the more liberal interpretation which the learned Judge placed upon the sections in question involves any straining of the language, while it is in complete harmony with the general principle in Bankruptcy law of recognizing and administering equities as far as possible. The 70th section provides for the creditors receiving the benefit of any advantageous leasehold, by enacting that if the insolvent holds under a lease property having a value above the amount of any rent payable under such lease, the Judge may order the rights of the insolvent in the leased premises to be sold, and at the time and place appointed such lease shall be sold upon such conditions as to the giving of security to the lessor as the Judge may order, and that such sale shall be so made subject to the payment of the rent, to all the covenants and conditions contained in the lease, and to all legal obligations resulting from the lease, and that all such covenants, conditions and obligations shall be binding upon the lessor and upon the purchaser, as if he had been himself lessee, and a party with the lessor to the lease. Now it must, I think, be admitted that what the Legislature had directly in view was the use of property held by the insolvent as tenant at a rental beneath the annual value. The draftsman of the statute had most prominently before his mind the case of an actual demise in writing, containing stipulations and agreements on the part of the lessee. But as I shall shew presently, that is not a sufficient reason for confining the application of the section to a written demise, and still less for limiting it to leases under seal. The argument, which would found such a conclusion upon the use of the word "covenant," is distinguished by subtlety rather than soundness. But reserving for a later stage the further considerations of the principles of interpretation applicable to these sections, I observe at this point that it is, in my judgment, beyond doubt that if it had been for the benefit of the estate, the assignee could have compelled the respondents to execute a formal lease. If the annual value of the premises had increased, the

creditors would not have been slow to insist upon this right, and it would have been accorded to them by the Court.

The respondents would not have been heard to say that for the purposes of that section a lease meant an instrument under seal. The 71st section enables the creditors or inspectors to fix, within certain limits, a time for the retention of property, which, not being subject to the provisions of the preceding section, or not being sold, is held under a lease extending beyond the year current under its terms at the time of the insolvency. Then follows the section upon which this question mainly turns. It enacts that from and after the time fixed for the retention of the leased property for the use of the estate the lease shall be cancelled, and shall from thenceforth be inoperative and null; and it enables the lessor, if he contends that he will sustain any damage by the termination of the lease, to make a claim for such damage, specifying the amount thereof under oath in the same manner as in ordinary claims upon the estate.

The argument for the appellant is, that the whole tenor of the expressions used proves that the Legislature was only dealing with the case of a lease valid at law, and had not in view any case where a resort to equity might be requisite. It may be observed in the first place that the Act applies to the whole Dominion. It is, therefore, not to be assumed that the Legislature was thinking of the artificial distinction between law and equity, which may exist in a particular Province. Granting that the enactment only refers to the case of an actual demise, and not to a mere naked agreement, and that the essentials to a demise must be determined by the law of the Province in which the property is situate, yet its exigency must be satisfied if the arrangement actually carried out is by the jurisprudence of that Province for all practical purposes deemed a lease. No reason can be suggested why, in framing an insolvency law, any higher position should be assigned to what is a valid lease at law, than to what is a valid lease according to the doctrines of the Court of Chancery.

The spirit in which the Courts have construed the Bankruptcy laws is well shewn by *Slack v. Sharpe*, 8 A. & E. 366, and *Ex parte Hopton*, 2 M. D. & D. 347, where it was held that although the statute of 6 Geo. IV. ch. 16, used the expression "deliver up such lease," which would *prima facie* seem to impart a written agreement, yet parol leases were within its scope. Delivering up possession was treated as equivalent to delivering up the lease. This authority meets the argument founded upon the use, in the 72nd section of our Act, of the expression, "the lease shall be cancelled."

I certainly am not going further than did the eminent Judges who decided those cases, when I hold that the transaction under review comes within the true intent of the Act. At the present day, when the artificial boundary between Courts of law and equity is being broken down, it would seem a strange anomaly to refuse to treat this transaction as equivalent to a lease. In one of the superior Courts it would be deemed to possess all the qualities of a lease under seal. In the others it would only be necessary to resort to equitable pleadings to obtain a similar recognition of its character. I think it would be difficult to suggest a case in which, under our present practice, a Court of law would be precluded from treating this transaction as the full equivalent of a demise under seal.

I am clearly of opinion that in fair construction the statute provides for this case, and that I could not hold otherwise without forgetting the maxim *qui hæret in literâ hæret in cortice*.

The case of *Ex parte Llynvi Coal and Iron Co.*, L. R. 7 Ch. 28, although I agree with Mr. Delamere that it is not precisely in point, is not without application. The company had agreed with Henry Hide to grant him a lease for ten years of certain premises. Hide having taken advantage of the Bankrupt Act, his trustee disclaimed the agreement and all interest in the premises. The company claimed to prove as creditors against the estate in respect of injury done to them by the disclaimer of the trustee, and

it was held that they were entitled so to do. But much of the reasoning upon which the Court proceeded does not find a place under our statute. From a consideration of the scope of the Imperial Act, it was thought to be quite plain that the object was, that the bankrupt should be absolutely relieved from all contracts which he had previously entered into, and that the intention was, that the person deprived of the right of action against the bankrupt and of the benefit of his contract, should be turned into a creditor in respect of the injury he had received.

In the language of Lord Justice James: "Every possible demand, every possible claim, every possible liability, except for personal torts, is to be the subject of proof in bankruptcy, and to be ascertained either by the Court itself or with the aid of a jury. The broad purview of this Act is, that the bankrupt is to be a freed man—freed not only from debts, but from contracts, liabilities, engagements, and contingencies of every kind."

The scope of our Act is much more restricted, and consequently these general considerations do not directly assist us in the task of construing these sections, but it is observable that the section with which the Court was engaged does not refer in express terms to an agreement for a lease, but speaks of "a lease" only. It does not seem, however, to have been questioned that the rights of the parties were to be governed by the same rules as if there had been a lease valid at law.

The appeal must be dismissed, with costs to be paid out of the estate.

Appeal dismissed.

RE JONES.—EX PARTE CONSOLIDATED BANK.

Insolvent Act, 1875, secs. 84 & 106—Double proof.

Held, affirming the judgment of the County Court, that where a creditor holds security on the partnership estate for the individual liability of an insolvent member of the firm, he is entitled to prove against the separate estate without putting a value on such security.

THIS was an appeal from the decision of the Judge of the County Court of the County of Hastings, sitting in insolvency. The point for determination arose in the administration of the insolvent estate of Washington W. Jones. He was in partnership with a person named Vandusen, but no proceedings in insolvency had been taken against the firm or Vandusen.

In 1873, the respondents, a banking company with whom Jones dealt, discounted notes made by Vandusen, payable to the order of Jones and endorsed by the latter individually, as well as in the name of the firm. The firm had no account with the bank, and the discounts were procured by Jones, to whose credit the proceeds were placed, but they were really obtained for and were used by the partnership. On the 15th of July, 1875, the Royal Canadian Bank, to whose rights the present respondents had succeeded, obtained a chattel mortgage from Jones & Vandusen to secure payment of the sum of \$9000, which debt was admitted to be identical with that proved in insolvency. In this instrument Jones and Vandusen were not described as partners, and no reference was made to the firm, but the inference to be naturally drawn from its terms was that they were then partners. It recited that they became indebted to the bank in the sum of \$9000, and that the bank demanded from them additional security for the debt, which was then represented by various notes made by Vandusen to the order of Jones. The proviso was for payment of the full sum of \$9000, according to the tenor of the said promissory notes or renewals thereof. It contained a distinct reservation of all rights and remedies against Jones and Vandusen, and stated that the mortga-

gees were to be at liberty to proceed upon any of the securities or upon the original indebtedness, as if each and every paper, document, writing, note, acceptance, security, or indebtedness was a separate and distinct transaction, and evidence of an original debt. The bank proved without placing any value upon this security, and the learned Judge of the County Court of Hastings having declined to order them to do so, this appeal was brought.

The case was argued on the 9th April, 1878, before Moss, C. J. A., sitting in insolvency.

E. Martin, Q.C., for the appellant. The decision of this case must turn on sections 84 and 106 of the Insolvent Act of 1875. Our contention is, that under these sections the respondents are required to place a value on the liability of Jones & Vandusen. The mortgage in question must, under the circumstances of this case, be considered "security from the insolvent's estate" within the meaning of section 84. There can be no doubt that the assignee would be entitled to file a bill to redeem this mortgage. If, however, the case is not covered by that section, it certainly is by section 106, inasmuch as the evidence shews that the money was obtained for the firm, who were the primary debtors, and it was thus a debt for which the insolvent became only secondarily liable. The rule laid down in *Ex parte English and American Bank*, L. R. 4 Ch. App. 49, in reference to a creditor who holds the several liability of one partner and the security of the firm, does not apply in this country. He referred to *Re Harper Wilson*, 2 App. 151; *Robson's Bankruptcy*, 666-670, 3rd ed.

G. H. Dickson, for the respondents. It was not contended in the Court below that section 106 affected this question in any way; and the Judge states that the appellant rested his whole case on section 84. The latter section clearly fails to assist him, as the security here does not come from the insolvent alone; and that section only applies to such securities. The learned Judge expressly finds that the debt was that of the insolvent and the security that of the firm. There is no

reason why a creditor should not hold any number of securities *aliunde*, so long as the fund to which the creditors are entitled is not drawn from. The respondents have nothing to do with the equities between the parties, if they were not cognizant of them. Neither does section 106 touch this case. In order to bring us within that section, the appellant is obliged to ask the Court to alter the position of the parties upon the notes. Here the insolvent was undoubtedly primary debtor, and therefore the section cannot apply. The position of this section amongst those dealing with procedure shews that it does not refer to the right to rank; it merely governs the voting capacity. Moreover, under that section the appellant would have a right to postpone the valuation until the payment of a final dividend; but it never can have been intended that a creditor should receive half a dozen dividends without putting a value on his security. He cited *Robson on Bankruptcy*, 3rd ed., 317.

E. Martin, Q.C., in reply. No importance is to be attached to the fact that section 106 appears amongst the sections relating to procedure, as most important principles are introduced under the same heading; amongst others, right of set-off is provided for.

April 16th, 1878. Moss C. J. A.—The appellants cannot rest their contention upon any general doctrine enforced in bankruptcy. The established rule in England and the United States is, that the creditor must apply in reduction of his claim any property of the bankrupt which he holds by way of security, and prove for the residue only; but any security which he may hold upon property not belonging to the estate against which the proof is offered does not go in reduction of the demand.

The decision of Lord Lyndhurst, in *Re Plummer*, 1 Ph. 56, has always been accepted as a correct exposition of the law. There, a creditor holding the joint and several obligations of two partners, and a mortgage on a part of the joint property was admitted to prove against the separate estates without surrendering or releasing his security. His Lord-

ship observed, at p. 59, that "If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission without giving up or realizing his security; for the principle of the bankrupt law is, that all creditors are to be put on an equal footing; and therefore, if a creditor chooses to prove under the commission he must sell or surrender whatever property he holds belonging to the bankrupt; but if he has a security on the estate of a third person, that principle does not apply. He is in that case entitled to prove for the whole amount of his debt and also to realize the security, provided he does not altogether realize more than twenty shillings in the pound." This rule, which seems to be founded in reason and equity, has maintained its place during the varied phases of the English law of bankruptcy. Thus, in 1868, Lord Justice Page Wood used the following language:—"That brings the case within those where the thing pledged is not the property of the bankrupt alone, but the property of the bankrupt and some other person, and in such circumstances the creditor may make his proof without deducting the value of his security."

Indeed, I did not understand the learned counsel for the appellant to controvert this general proposition. His contention was that the effect of our Insolvent Act is to establish a different rule. The sections upon which he relies are the 84th and 106th. The former requires a creditor who holds security from the insolvent or from his estate, or a creditor who, in the case of there being more than one insolvent liable as partners, holds security from or the liability of one of them as security for a debt of the firm, to place a value upon his security. I do not think that this case falls within either the letter or the spirit of this clause. Here, the bank, having the individual liability of a member of a firm, is proving against his estate, while it holds a security upon the co-partnership property. To the argument that this mortgage is in substance a security from the estate of the insolvent I cannot accede. The interest which his estate has in the property owned by it is remote and indi-

rect, being no more than that the value of the equity of redemption shall be applied in liquidation of the liabilities of the firm. The right of the assignee of his private estate is simply to receive any balance which may be coming to him out of the total assets of the firm, upon its affairs being adjusted. This consideration also serves to shew the absolute impossibility of placing a value upon the interest of the insolvent in the mortgaged property.

The 106th section seems by no means easy of construction. It occurs among the sections classed under the head of *Procedure*, but as Mr. Martin pointed out, apart from any other considerations, it is difficult to attach much weight to this collocation, when we find the very next section under the same heading dealing with the important right of set-off, which is a great deal more than mere procedure. The section in question enacts that a creditor holding a mortgage or collateral security on the estate of a debtor, or on the estate of a third party for whom such debtor is only secondarily liable, may release or deliver up such security to the assignee, or he shall, by his affidavit for the issue of a writ of attachment, or by an affidavit filed with the assignee at any time before the declaration of a final dividend, set a value upon such security; and from the time he shall have so released or delivered up such security, or shall have furnished such affidavit, the debt to which such security applied shall be considered as an unsecured debt of the estate, or as being secured only to the extent of the value set upon such security, and the creditor *may rank as* and exercise all the rights of an ordinary creditor for the amount of his claim, or to the extent only of any balance thereof above and beyond the value set upon such security, as the case may be. I confess that a full and consistent interpretation of this section seems to me to be pregnant with difficulty. If the Legislature intended to introduce a case for valuation in addition to those specified in the 84th section, it is singular that this part of the statute should have been selected for the purpose. Then, an adequate reason does not readily

occur to the mind for allowing the affidavit of valuation to be filed with the assignee at any time before the declaration of a final dividend, if the amount that the creditor is to receive depends upon the value of his security. Still, in one of the cases apparently provided for, namely, that of the creditor holding security on the property of the insolvent himself, we know that he is bound to make the valuation upon oath when he puts in his claim. But I do not think that I am bound to endeavour in this appeal to solve these difficulties, for, in my opinion, the bank does not fall within the description of persons named in the section. I have already pointed out that it is not a creditor holding security on the estate of the insolvent, and I think it equally clear that it does not hold security on the estate of a third party for whom the insolvent is only secondarily liable.

Its security is upon the property of the firm of Jones & Vanduson. There is no ground for holding that the firm was primarily and the insolvent secondarily liable.

The advances were originally made to Jones himself, and the bank when taking the mortgage stipulated most carefully against its rights in other respects being prejudiced.

It stands wholly outside of any equities that may subsist between the insolvent and his firm.

According to the decision in *Re Harper Wilson*, 2 App. R. 151, the bank is entitled to prove against the partnership estate in the event of the firm being placed in insolvency. It will then have to fix a value upon its security, and can only claim a dividend upon the balance; but I can perceive no warrant for the proposition that it must also place a value upon it when proving against the separate estate.

I think the appeal must be dismissed, with costs to be paid out of the estate.

Appeal dismissed.

RE FAIR AND BELL.

Insolvent Act of 1875—Garnishment after assignment—Section, 125.

Upon A's insolvency in Montreal, T a creditor residing in the County of Renfrew, proved his claim, and afterwards made an assignment. Subsequently F, A's assignee, not having heard of T's insolvency, collocated him on the dividend sheet for the amount due on his claim, whereupon certain creditor's of T, took proceedings in the Superior Court at Montreal to garnish this amount. Upon receipt of a letter from B, T's assignee, demanding payment of the dividend F informed him that certain persons in Montreal were endeavouring to get payment of this dividend from him; but he neither mentioned who they were or the nature of their claim. In accordance with the practice of the Courts in Quebec, F made an affidavit of the position he occupied towards the principal debtor, in which he recited the above facts, but took no further action in the matter. He neither advised B that this declaration had been made, nor held any further communication with him. No opposition being offered, an order was made for the payment of the debt and costs by F within fifteen days, and without waiting for the expiration of this period, or giving B any notice, F paid the amount.

Held, affirming the judgment of the County Court, that B was entitled to recover the dividend from F; and that F could not protect himself on the ground that he had paid the money in obedience to the order of a Court of competent jurisdiction, as under section 125 of the Insolvent Act 1875, the Court had no authority to make such an order after T's assignment; and even if that Court had possessed jurisdiction the judgment could not defeat B's rights, as he was not a party to the proceedings or affected with notice thereof, and F had been guilty of negligence in protecting himself.

THIS was an appeal from a decision of the learned Judge of the County Court of Renfrew, sitting in insolvency, whereby he ordered the appellant Fair, who was the assignee of William W. Austin, to pay the respondent Bell, the assignee of Robert Turner, the full balance of a certain dividend declared by the appellant, after deducting a sum previously paid to the respondent.

The facts are stated in the judgment.

The case was argued on the 26th March, 1878.

J. Bethune, Q. C., for the appellant. The respondent is not in a position to ask the assistance of the Court, as the whole difficulty is due to his omission to inform the appellant of his appointment as assignee. The appellant was

ignorant of Turner's insolvency when the writ of *saisie arrêt* issued, but as soon as he was informed of it by the respondent he advised him of the proceedings which were being taken to garnish the dividend; and it then became the respondent's duty to resist the claim. Under the circumstances Bell must be treated as a party to the transaction, and is concluded by the adjudication in the Quebec Court: *Wood v. Dunn*, L. R. 2 Q. B. 73.

S. Richards, Q.C., for the respondent. There is no duty imposed on an assignee to give notice to a debtor that his creditor has made an assignment. The appellant was bound by the official notice of the assignment. At any rate he had express notice before he paid over the money in question. The Quebec Court had no jurisdiction to deal with the matter, as the 125th section of the Insolvent Act, 1875, confines all remedies to the Insolvent Court. But even if the Quebec Court had jurisdiction, the appellant cannot shield himself behind this judgment, inasmuch as the respondent was not a party to the proceedings, and the appellant paid the money before the expiration of the fifteen days which the law allowed. Moreover the appellant permitted the judgment to go by default, and it is well settled that such a judgment is no protection unless the party has done everything in his power to protect himself. He referred to *Dumble v. White*, 32 U. C. R. 601; *Crombie v. Jackson*, 34 U. C. R. 575; *Munro v. The Commercial Building Society*, 36 U. C. R. 464; *Westover v. Perkins*, 2 E. & E. 57; *Wolff v. Oxholm*, 6 M. & S. 92; *Simpson v. Fogo*, 9 Jur. N. S. 403.

Bethune, Q.C., in reply. The appellant did all that was necessary under section 619 of the Code. Section 125 of the Insolvent Act, 1875, does not apply here, as it refers to enforcing claims against the estate, while the petition in question was directed against the insolvent personally. At any rate we are entitled to an order for Bell to assign any right he may have to set aside the proceedings in Quebec, and to recover from Messrs. Thibaudeau the money they received.

April 9, 1878. Moss, C. J. A.—Austin became insolvent towards the end of 1874, and Fair was appointed creditors' assignee. At this time Turner was a creditor of Austin to the amount of \$2,700, and in the ordinary course he proved his claim.

On the 23rd November, 1876, Turner became insolvent, and the respondent Bell, on the 12th December, 1876, became his assignee. On the 7th March, 1877, Fair declared a dividend on the estate of Austin, payable on the 28th of that month, and ranked Turner for the sum of \$411.25 upon his proof.

At the time the dividend was declared, Fair did not know that Turner had been placed in insolvency, or that Bell was his assignee. On the 22nd of the same month, certain persons called Thibaudeau & Co. issued out of the Superior Court at Montreal a writ of *saisie arrêt après jugement*, which bears an analogy to garnishment proceedings in our Courts.

Bell having written to Fair demanding payment of the dividend, Fair, on the 7th of April, replied by a letter in which he informed Bell in a very vague manner that some persons were endeavouring to get payment of the dividend from him in Montreal, but he did not mention who they were, nor further specify the nature of their alleged claim. Having asked for evidence of Bell's official character, this request was complied with on the 10th of April, when a certified copy of the assignment was transmitted to him. The practice of the Courts in Quebec requires the garnishee, who is there styled the "*Tiers saisie*," to make a declaration or statement under oath of the position he occupies towards the principal debtor. (See Arts. 612, 631 of the Civil Code.)

On the 30th of April, Fair made such a declaration, in which he affirmed that he had collocated Turner as a creditor of Austin's estate; that at the time the dividend was declared he did not know that Turner had become insolvent, but that subsequently he had been informed that his estate had been placed in insolvency and Bell appointed

his assignee; that Bell had filed with him a certified copy of his appointment; and that personally he had no money or property of any kind belonging to Turner. This was the sole action he took in the matter. He communicated no further with Bell. He did not advise him that this declaration had been made, and that he looked to him to take any proceedings that were necessary to defeat the claim of Messrs. Thibaudeau. In a word he seems to have thought that he had discharged his whole duty, and need take no further interest in the matter when he had made his declaration. The cause having been inscribed for judgment, and no opposition being offered, an order of the court was made on the 5th of May, ordering Fair within fifteen days to pay the plaintiffs the amount of their debt and costs. Without waiting for the expiration of the fifteen days, and without giving Bell any information as to the position which the matter had assumed, he paid the amount on the 9th of May.

A singular state of facts is disclosed upon this appeal, but I think that the principles on which it should be determined are by no means doubtful.

I confess that I find an insuperable difficulty in understanding the process of reasoning by which the appellant arrived at the conclusion that in acting as he did he was discharging his whole duty towards the respondent. His conduct appears to me to have been singularly injudicious, and I am not surprised that he has been exposed to the suspicion, which has been expressed during the progress of this controversy, of having desired to favour the Messrs. Thibaudeau. But for his fiduciary position and his personal character, I should myself have felt that the charge was probably not without foundation. I do not think, however, that whatever air of suspicion surrounded the circumstances, I could judicially find the existence of such a motive, and so far as I am concerned I exonerate him from any such charge. But I cannot at the same time exonerate him from the order appealed against, which I

think was eminently proper, and which seems to be as fully warranted by law as it is founded upon justice.

The appellant's contention is that having paid the money in obedience to the judgment of a court of competent jurisdiction, it is against natural justice that he should be compelled to pay it over again.

This contention is readily disposed of upon two grounds at least, either of which is sufficient. In the first place this is not a judgment upon a matter of which the Court had jurisdiction in the sense of possessing authority to condemn Mr. Fair to pay this money to the Messrs. Thibau-deau. Months before the Messrs. Thibaudeau commenced the proceeding of *saisie arrêt*, to realize their judgment, their debtor had been placed in insolvency, and all his estate and effects, including his claim against Austin, had become vested in his assignee. Therefore the only remedy available to his creditors was that given by the Insolvent Act. The 125th section expressly declares that all remedies sought or demanded for enforcing any claim for a debt may be obtained by an order of the Judge, and not by any suit attachment, opposition, seizure or other proceeding of any kind whatever. The corresponding section in the Act of 1869 has been interpreted by the highest authority as restrictive of the right of a creditor to take proceedings outside of the insolvency. I cannot conceive it to be possible that the Quebec Court would have pronounced this judgment, if the true state of facts had been fully and fairly disclosed. It is true that a sufficient outline was sketched in the declaration; but Mr. Fair did not appear to support its accuracy by proof, and it is quite consistent with what appears before me—indeed, I think it is the inference which proper respect for the Court requires to be drawn—that it was treated as an allegation unsustained by proof, the onus of which was imposed upon the *Tiers saisie*.

But, if the judgment were to be treated as that of a Court of competent jurisdiction, I cannot see how it defeats the appellant's rights. He was not a party to the proceeding. The pretence that he was affected with notice, in

consequence of receiving the vague and unsatisfactory letter I have mentioned, is idle in the extreme. If possible, the attempt to argue that he is to be deemed a party, because Turner was so, is still more hopeless. As I have already pointed out, Turner had then no interest in the matter. The right to the dividend was not in him, but in the respondent. It would be a doctrine equally novel and pernicious, that notice to the insolvent after an assignment is to be treated as a sufficient notice to the assignee. Even if the respondent had been distinctly notified by the appellant I fail to perceive any obligation on his part to intervene in the proceedings. Indeed, the learned counsel for the appellant was not able to offer any definite suggestion as to the steps he, could reasonably be expected to have taken.

From what I have said it appears that this is an attempt to establish that the dividend the right to which was absolutely vested in him for the benefit of Turner's creditors, has been wrested from him by a judgment to which he was neither party nor privy. The reduction of the case to this proposition is decisive of the issue. It is simply impossible to point to anything, either done or omitted by Bell, by which his right of property in this dividend was lost or forfeited.

The appellant cannot find shelter under the rule acted upon in *Wood v. Dunn*, L. R. 2 Q. B. 73, both because he had distinct notice of the assignee's title before the adjudication against him was pronounced, and because he paid the money prematurely. The facts of the case do not render it necessary for me to consider the point left undecided by the Court of Queen's Bench, namely whether it would be safe for a garnishee, having been served with an order to pay, and afterwards, and before payment, receiving notice of an insolvency, after that notice to pay under the order without an immediate threat of execution, and without taking any steps himself to get the order set aside, or giving notice to the assignee informing him that he should pay unless the assignee got the order set aside. I agree with

Mr. Richards's argument, that before a garnishee can avail himself of the rule protecting payments made under the order of a court of competent jurisdiction, he must shew that he was not guilty of negligence, but that notwithstanding the exercise of reasonable diligence he was compelled to pay. I need not repeat the considerations which demonstrate that the appellant has not brought himself within the limits of the rule.

It is urged that the respondent was negligent in not giving the appellant earlier notice of his appointment as assignee, and that but for this default the dividend would not have been declared in Turner's name, and no difficulty would ever have arisen. Much stress is laid upon the hardship that would be imposed upon a garnishee, if he paid the money without any notification of the insolvency of his creditor, except that afforded by the publication of the official notices which he had not actually seen. It will be time enough to deal with that question when it arises. In the meantime it is sufficient to say that the appellant had notice nearly a month before any order was made.

It was competent for the learned Judge when making the order appealed from to impose upon the present respondent such terms as might seem just and reasonable. Mr. Bethune now asks that it shall be a term of the order that the respondent execute to the appellant an assignment of any right he may have as assignee to set aside the judgment obtained by the Messrs. Thibaudeau, and to recover back the money they received. It seems reasonable that this should be done, *quantum valeat*, and if necessary an order to that effect may be made.

The appeal is dismissed, with costs.

Appeal dismissed.

HOLT ET AL. V. CARMICHAEL.

Chattel mortgage—Description—R. S. O. ch. 119, sec. 23.

Held, affirming the judgment of the County Court, that the words “one single buggy,” in a chattel mortgage, were not a sufficient description to satisfy R. S. O. ch. 119, sec. 23.

APPEAL from a judgment of the County Court of the United Counties of Dundas, Stormont, and Glengarry.

This was an action of trover brought to recover the value of a buggy which the plaintiffs claimed as being included in a chattel mortgage made to them by one Parker and another. The conveyance was of “all and singular the goods, chattels, furniture, and household stuff, hereinafter particularly mentioned and expressed, that is to say: three peddling waggons, *one single buggy*, and the stock-in-trade of the parties of the first part, contained in the building now used by the parties of the first part.”

The case was tried at Cornwall, before Pringle, junior County Judge without a jury.

It was objected by the defendant that the buggy in question was not covered by the mortgage; and also that the mortgage was void, as the amount of the debt for which it was given was not correctly set forth. Other objections were also taken to the form of the mortgage. The learned Judge entered a verdict for the plaintiffs, with leave reserved to the defendant to move.

Afterwards a rule *nisi* to set aside the verdict was made absolute by the learned junior Judge, on the ground that the buggy was not sufficiently described in the mortgage.

The plaintiffs appealed.

The appeal was argued on the 15th March, 1878 (a).

Bethune, Q. C., for the appellants. This case is not distinguishable from *Mills v. King*, 14 C. P. 223, where a similar description was held to be sufficient; and the only

(a) *Present*.—MOSS, C.J.A.; PATTERSON, and MORRISON, JJ.A.

question is, whether that case has gone too far. The evidence shews it to have been the only single buggy the mortgagors had. It would be impossible to give a more particular description of a chattel which is in its nature movable. He cited *Mathers v. Lynch*, 28 U. C. R. 354; *Bertram v. Pendry*, 27 C. P. 371; *Fitzgerald v. Johnston*, 41 U. C. R. 440.

Richards, Q. C., for the respondent. *Mills v. King* is not supported by the later decisions on this question. The cases shew that something more than the generic name is required. There must be a description in the mortgage by which the chattel can be identified. Then the amount for which the mortgage was given was not correctly stated, which is a fatal mistake. He referred to *Rose v. Scott*, 17 U. C. R. 385; *Sutherland v. Nixon*, 21 U. C. R. 629; *Mason v. McDonald*, 25 C. P. 435; *Haworth v. Fletcher*, 20 U. C. R. 278; *Moffatt v. Coulson*, 19 U. C. R. 341; *Robinson v. Patterson*, 18 U. C. R. 55; *Allen v. Thompson*, 1 H. & N. 15; *Hatton v. English*, 7. E. & B. 94; *Miller* on Bills of Sale, 278-291.

Bethune, Q. C., in reply. In the absence of fraud, an incorrect statement of the amount does not invalidate the mortgage: *Walker v. Niles*, 18 Gr. 210

May 4, 1878 (a). MORRISON, J.A.—Upon an examination of the decisions from the earliest day to the present time, they are found to be to a great extent uniform upon the point here in question, with the exception of the case of *Mills v. King*, 14 C. P. 223, where Mr. Justice Wilson was of opinion, in giving judgment, that goods described as “one omnibus,” &c., to which no locality was given, passed under the mortgage.

That learned Judge seemed there to be of opinion that as the words “one omnibus,” without other description, would be a sufficient description in an action of detinue, it would be a sufficient description in an assignment or mort-

(a) *Present*.—MOSS, C. J. A. ; PATTERSON, and MORRISON, JJ.A.

gage to answer our statute. I cannot concur in that view.

The words of the statute, Con. Stat. U. C. ch. 45, sec. 6, R. S. O. ch. 119, sec. 23, are, "All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished."

In the case of *Rose v. Scott*, 17 U. C. R. 385, Sir John Robinson, C. J., in giving judgment, said, at p. 387: "The more difficult point is to settle the force to be given to the word used in the Act requiring an efficient and full description, so that the goods may be thereby readily known and distinguished. * * We do not think it reasonable to hold that what is exacted is that any person shall be able to find in the deed all that is required for enabling him to distinguish the chattels mentioned in it by merely casting his eye on the chattels."

And after giving an example of a livery stable keeper assigning a pair of horses which he had driven for the last two years in a public stage between Toronto and Streetsville as a sufficient description, that learned Judge further said, at p. 387: "It is not necessary to go much at length into this matter, for we should despair of being able to lay down any standard or any test by which we could pronounce on the sufficiency of any description, and it would be dangerous and inconvenient to attempt to do it. We must at least endeavour, however, to preserve consistency in our own decisions, otherwise we should be leading parties into difficulty."

After holding that certain articles passed as held in *Harris et al. v. Commercial Bank*, 16 U. C. R. 437, 444, he was of opinion that certain articles, trunks, waggons, carriages, &c., were so described that they did not pass by the deed, saying at p. 388: "For these are not in any manner described, so that if Mr. Fraser owned more of any such articles of property than the number set down in the deed, it would be impossible to tell which of the class were intended to be assigned. Where a man has a number of horses or

cows, and mortgages, two of each, how can it be known which of them are to be passed by the deed? It may be that the numbers mentioned in the deed were all that the mortgagor had of the kind, but it does not say so. * * This would seem to be treating the Act as meaning nothing, for there is nothing specific in such a description."

And in *Sutherland v. Nixon*, 21 U. C. R. 629, where "one buggy" was mentioned without any other description, it was held to be not a sufficient description of the chattel.

The question we are now discussing was before the Court of Error and Appeal in *Wilson v. Kerr*, 18 U. C. R. 470. The words in the assignment were all the assignor's other goods and horses and cattle, &c. Draper, C. J., in giving judgment said, at p. 471: "What the statute requires is, '*such efficient and full description*' of the goods and chattels sold or mortgaged that the same 'may be thereby readily and easily known and distinguished' * * The first part of the sentence contains no other description of the matters intended to be conveyed except that they were '*his*' the assignors." * * If the words of the Act have any meaning, this can never be held to be an efficient or full description of goods or chattels. No locality is given, no description, except the *nomen generalissimum*, which will include any and every description of goods, &c., * * and as to horses and cattle there is the general description, but nothing particular, no marks, colour, or other individual characteristic. What description more *general* could have been used, or how can this be deemed efficient or full?" The Court upheld the judgment of the Court of Queen's Bench in *Wilson v. Kerr*, 17 U. C. 168, where Burns, J., after referring to the words above quoted said, at p. 171, "It cannot be held a compliance with the provision, that they are so to be described that the same may be thereby readily and easily known and distinguished." Where all or any of these things then were, or were to be found the deed is silent * * If it would be inconvenient to describe each article or each set of articles, either as to numbers or quantities, marks, or otherwise, that

they might be known, yet a description by locality might be given which would enable a person to go with the deed in his hands and point out the goods transferred."

Following these cases the Court of Common Pleas, in *Mason v. McDonald*, 25 C. P. 435, held that the words, "two sets of blacksmithing and one set of waggon maker's tools complete," were not a sufficient description; and Hagarty, C.J., in delivering judgment, referred to the judgment of Mr. Justice Wilson, in *Mills v. King*, 14 C. P. 223, above mentioned as being a decision which was not supported generally by the decisions.

The learned Chief Justice also referred to the judgment of Mr. Justice Wilson in *Mathers v. Lynch*, 28 U. C. R. 354, where he, in that case, supported a description of goods as sufficient by holding them to be included in a locality assigned in a preceding sentence to other goods. With all respect for that learned Judge, I cannot see there was any necessity, if *Mills v. King* was a correct exposition of the statute, for invoking or applying locality as an incident identifying the goods so as to make the description of the goods referred to in *Mathers v. Lynch*, sufficient.

The Legislature in enacting as it has done meant something more to appear in the instrument than merely stating a horse or a buggy, &c. There may be a difference of opinion as to the manner in which various chattels ought to be described in order to satisfy the statute; but it is obvious there are many ways in which articles may be specifically described and distinguished from other articles of the same class.

It has been said in some of these cases, how can a third party distinguish a chattel by its locality being stated at the time of the execution of the mortgage, when the article in question may be removed the very next day? No doubt such a description gives little information to a creditor or a stranger, but it gives him some information which on inquiry may satisfy the party of the identity of the article in question being the one assigned at the time of the execution of the instrument. But the statement "one

buggy," without any other description or reference or locality, affords no means whatever by which the chattel mentioned can be identified.

It is quite evident that the Courts have striven to uphold assignments and mortgages, and have given a very wide and liberal interpretation to the provisions of the statute,—more liberal, I am disposed to think, than the framers of the statute intended.

The object and policy of the law was no doubt to prevent secret and fraudulent assignments and mortgages of chattels, and to afford means by which persons having dealings with mortgagors, or otherwise interested, may readily obtain accurate information by an inspection of the instrument filed, and to enable such parties to distinguish the articles assigned. And if persons who claim under such instruments do not take the precaution or the trouble to follow the enactments of the statute, and omit to describe in some reasonable way the chattels intended to be mortgaged on the instrument itself; so that their identity may be ascertained, and if loss by reason of such omission is the result, they are themselves to blame.

I see no impossibility in giving a distinguishing description to any article that might be assigned.

On the whole, after considering the decisions in the Courts below, and the decision in the Court of Error and Appeal, we are of opinion that the learned Judge in the Court below was right in holding that the words "one single buggy" was not of itself a sufficient description to satisfy the statute, and that this appeal should be dismissed, with costs.

Such being our opinion, and as the defendant succeeds on the main question, it becomes unnecessary to decide the other point raised by the respondents.

Appeal dismissed.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,
FROM THE 28TH JUNE, 1877, TO THE 4TH MAY, 1878.

ABANDONMENT.

See DIVISION COURT.

ACCRETION.

Accretion—Highway—Wharf.] —
By 10 Geo. IV. ch. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to erect all such needful wharves, buildings, &c., as should be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering, lying, loading, and unloading within the same, and to alter, repair, and enlarge the same as might be expedient.

The plaintiff's land extended to the water's edge and fronted on a public highway, at the end of which the company constructed a pier originally of thirty feet in width. From time to time earth dredged from the basin was deposited to the east of this pier, and crib work was placed on the outside to prevent it from being washed away. On the additional land thus formed partly by

accretion and partly by the action of those representing the company, the defendants, in whom the powers conferred on the Harbour Company had been vested, built a storehouse, and a fence dividing it from that part of the plaintiff's land which had accrued to him from alluvial deposits, whereupon the plaintiff filed a bill to compel their removal, on the ground that they were on the highway and prevented him from having access thereto from his land.

Held, reversing the decree of PROUDFOOT, V. C., 23 Gr. 507, that the plaintiff was not entitled to relief, as the formation in question was not part of the highway, but an artificial structure constructed for harbour purposes under the authority of the Act.

Held, also, that gradual accretions in front of a road allowance running down to the lake form part of the road, just as similar deposits in front of a lot accrue to the owner thereof.

Held, also, that although the statute 10 Geo. IV. ch. 11, did not expressly authorize the company to build a wharf in front of the street,

the recognition of the right in subsequent statutes was sufficient.—*Standly v. Perry et al.*, 195.

This judgment has been affirmed by the Supreme Court.

ALTERATION.

See SALE OF GOODS, 2.

APPEAL.

Right of.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

ASSESSMENT AND TAXES.

1. *Jurisdiction of Local Legislation—Power to tax incomes.*]—*Held*, reversing the judgment of the Queen's Bench, 40 U. C. R. 478, that under the B. N. A. Act, 1867, a Provincial Legislature has no power to impose a tax upon the official income of an officer of the Dominion Government, or to confer such a power on the municipalities.

Semble, per HAGARTY, C. J. C. P., and BURTON, J. A., that the Legislature of Ontario did not intend to include such an income in the exemptions mentioned in 32 Vic. ch. 36, sec. 9, sub-sec. 12, O., as one derived "elsewhere out of this Province."

Per PATTERSON, J. A., that by that statute, if *intra vires*, such incomes are exempt.—*Leprohon v. The Corporation of the City of Ottawa*, 522.

2. *Sale of land for taxes—Proof of taxes in arrear—Description in sheriff's deed*, 32 Vic. ch. 36, sec. 155, O.; 16 Vic. ch. 183, sec. 65.]—*Held*, affirming the decree of the Court of Chancery, that the sale of the land in question was valid, as

the evidence, which is fully set out below, shewed that there were five years' arrears of taxes due at the time of the sale.

The land was described in the sheriff's deed as containing "100 acres more or less."

Held, a sufficient compliance with section 65 of 16 Vic. ch. 183.

Semble, per PATTERSON, J. A., where it appears that no portion of the taxes have been overdue for the period prescribed by the statute under which the sale takes place, the sale is invalid; and the defect is not cured by section 155 of 32 Vic. ch. 36, O., as it only applies to defects in procedure. Where, however, there is evidence of arrears, the case is *prima facie* within the Statute, though it may be shewn in answer that they were not sufficient to authorize the sale.—*Crysler v. McKay et al.*, 569.

This decision has been reversed by the Supreme Court.

3. *Distress for taxes after return of roll—Proof of resolution under R. S. O., ch. 180, sec. 102—Notice of action.*]—In an action against a collector and his bailiff for an illegal distress, it was shewn that the distress had been made after the return of the roll; and no resolution authorizing the collector to continue to collect the taxes under R. S. O., ch. 180, sec. 102 was proved.

Held, reversing the judgment of the County Court, that the distress was illegal; and that there was no presumption that the collector had received such authority merely because it was conceded that he acted as collector in directing the levy. *Quære*, referring to *Holcomb v. Shaw*, 22 U. C. R. 92, even if such a resolution had been proved, it would be ineffectual.—*Langford v. Kirkpatrick*, 513.

BANKRUPTCY AND INSOLVENCY.

1. *Insolvent Act, 1875—Assignee's costs.*—After a deed of composition and discharge had been agreed upon, but before it was actually executed, the assignee, at the request of the inspectors, surrendered the estate to the insolvent, but never re-conveyed it. The insolvent afterwards refused to pay the assignee's fees in the insolvency proceedings, whereupon the assignee petitioned the Judge for an order on the insolvent to pay, and in default for permission to resume possession of the estate.

Section 49 of the Insolvent Act of 1875 provides that in every case a deed of composition shall be on condition, whether the same be expressed or not, that if the same be carried out the insolvent shall pay the costs in the insolvency proceedings, including those for the confirmation of such composition.

Section 59 declares that the composition may be either payable in cash or on terms of credit, and the payment secured or not, according to the pleasure of the creditors signing it, and the discharge, either absolute or conditional, upon the condition of the composition being satisfied; and if the discharge be conditional, upon the composition being paid, and the deed of composition and discharge should cease to have effect, the assignee shall immediately resume possession of the estate.

Held, affirming the judgment of the County Court Judge, that under sec. 59 the assignee has no power to resume possession of the estate, except upon default in payment of the composition, where such payment is a condition precedent to the discharge.

Semble, that sec. 118 has reference

only to costs of proceedings worked out in insolvency; but that if it applied here the assignee had lost his lien by parting with the possession. —*Re Silver, an Insolvent*, 1.

2. *Insolvent Act, 1875, secs. 9 and 18—Proceedings under.*—*Held*, reversing the judgment of the County Court Judge, that a *bona fide* purchase for value of a claim against an insolvent, made by a creditor for the express purpose of increasing such creditors's demand to an amount sufficient to issue a writ of attachment under section 9 of the Insolvent Act, 1875, is valid.

Held, also, that an application under section 18 to set aside a writ of attachment for a substantial insufficiency in the affidavit must be made within five days from the issue of the writ. —*Carrier et al. v. Allin*, 15.

3. *Insolvent Act, 1875 sec. 39—Powers of assignee to avoid mortgage—Secs. 130 132—Chattel Mortgage Act.*—*Held*, affirming the judgment of the County Court Judge, that under sec. 39 of the Insolvent Act 1875, an assignee represents the creditors for the purpose of avoiding a mortgage for want of compliance with the Chattel Mortgage Act.

An affidavit that the mortgage was not executed for the purpose of preventing the creditors of such mortgagor from obtaining payment of any claim against—not saying against whom. *Held*, clearly not in compliance with such Act.

The learned Judge found under sec. 130 of the Insolvent Act 1875, that the mortgagee did not know of the insolvents' inability to meet their engagements, but that it was notorious, and that he had probable cause of believing it, so that the mortgage must be presumed to be made with

intent to defraud creditors; and as a conclusion from these facts, he found that such intent was known to the mortgagee, and that sec. 132 also applied.

Held, that the finding of the facts required by sec. 130 was sustained by the evidence; but that the conclusion from these facts was not warranted, and that sec. 132 therefore did not apply.—*Re Andrews, an Insolvent*, 24.

4. *Foreign bankruptcy—Assignment thereunder—Lands in Canada.*—Bankruptcy proceedings in a foreign country will not affect real estate in Canada.

The insolvent, who owned goods in Canada, residing and carrying on business in the State of New York, was, with his co-partners, adjudicated a bankrupt by the Court of that State on the 15th November, 1873, and, in accordance with a resolution passed by the creditors under a provision of the Bankrupt Law of the United States, the bankrupts, on the 14th February, 1874, conveyed their estates to a trustee appointed by the creditors for the purpose of winding up the estate. The deed was styled "In bankruptcy," and purported to "convey, transfer, and deliver all their and each of their estate and effects" to the trustee, to be applied for the benefit of the creditors in like manner as if the bankrupts had, at its date, been duly adjudged bankrupts, and the trustee appointed assignee in bankruptcy under the Bankruptcy Act of the United States. On the 26th August, 1874, a writ of execution against the insolvent's lands in Canada was placed in the sheriff's hands by the defendants, who had in the meantime recovered a judgment against him. Subsequently, the insolvent,

by way of further assurance, executed a conveyance of all his lands in Canada to the same trustee for the said creditors. The plaintiff, the substituted trustee, filed a bill to compel the removal of the writ of execution on the ground that it formed a cloud on his title to these lands.

Held, reversing the judgment of PROUDFOOT, V. C., 24 Gr. 356, that the plaintiff was not entitled to relief, for that the deed of the 14th February merely vested in the trustee the estate, which would have passed to an assignee by operation of the Bankruptcy Law; and there was no evidence of any intention to pass more.

Per PATTERSON, J. A., the words "convey, transfer, and deliver," were operative words of conveyance: that the debts due to the creditors formed a sufficient consideration: and that the general description "all and each of their estate" would have been sufficient to convey the lands in question, unless restrained, as they were, by the effect of, and construed, as they must be, with reference to the intention shewn by the whole instrument.—*Macdonald v. The Georgian Bay Lumber Co.*, 36.

This decision has been affirmed by the Supreme Court.

5. *Insolvent Act of 1875—Withdrawal of claim—Composition and discharge—Confirmation of—Fraud—Secs. 63 and 136.*—To a plea of a discharge under the Insolvent Act of 1875, confirmed by the Judge, the plaintiff replied that the defendant purchased the goods sued for on credit at a time when he knew himself to be unable to meet his engagements, which fact he concealed from the plaintiffs with intent to defraud the plaintiffs of the said goods.

The 63rd section of the Insolvent Act of 1875 declares *inter alia* that a discharge under the Act shall not apply without the express consent of the creditor to any debt for enforcing payment of which the imprisonment of the debtor is permitted by the Act.

The 136th section enacts that a person guilty of what was charged in the replication shall be guilty of a fraud, and liable to imprisonment, "provided always that in the suit or proceeding taken for the recovery of such debt the defendant be charged with such fraud, and be declared guilty of it by the judgment rendered in such suit or proceeding.

The case was tried without a jury, and the Judge left it for the Court to say whether, upon the facts as found by him, the defendant was guilty of fraud.

Held, on appeal from the judgment of the Queen's Bench, 40 U. C. R. 366, which was affirmed, that the judgment referred to in section 136 is the verdict of the jury or the judgment given at the trial by the Judge, if the case is tried without a jury; and that the replication must fail, as the defendant had not been found guilty of fraud at the trial.

Evidence, which is fully set out in the judgment, was given to prove that the deed was not executed by the requisite proportion of creditors in number and value, owing to a claim having been improperly withdrawn.

Held, that the confirmation of the deed was final and conclusive, and that this Court could not go behind the Judge's order.

Semble, that, under the evidence stated in the case, the claim could not be considered as withdrawn.—*Rooney et al. v. Lyons*, 53.

6. *Insolvent Act*, 1875, *secs.* 70, 71, 72, 73—*Cancellation of agreement for lease—Damages for.*]—One E. agreed to rent certain premises for ten years on condition that certain improvements were made. The agreement was evidenced by a letter from the landlord, to the terms of which E. assented. After the alterations were completed E. entered, and while still in possession under this agreement became insolvent. The inspectors cancelled the lease, and delivered up the premises at the end of the current year, whereupon the landlord claimed to be allowed damages under the 70th and three succeeding sections of the Insolvent Act of 1875.

Held, affirming the decision of the County Court Judge, that these sections are not limited to leases valid at law, but that they apply equally to leases valid in equity; that here the execution of a formal lease could have been compelled; and that the landlord was therefore entitled to prove for damages for the cancellation.—*Re Erly, an Insolvent*, 617.

7. *Insolvent Act*, 1875, *secs.* 84 and 100—*Double proof.*]—*Held*, affirming the judgment of the County Court, that where a creditor holds security on the partnership estate for the individual liability of an insolvent member of the firm, he is entitled to prove against the separate estate without putting a value on such security—*Re Jones—Ex parte Consolidated Bank*, 626.

8. *Insolvent Act of 1875—Garnishment after assignment—Section 125.*[—Upon A's insolvency in Montreal, T. a creditor residing in the County of Renfrew, proved his claim, and afterwards made an assignment. Subsequently F, A's assignee, not

having heard of T's insolvency, collocated him on the dividend sheet for the amount due on his claim, whereupon certain creditors of T, took proceedings in the Superior Court at Montreal to garnish this amount. Upon receipt of a letter from B, T's assignee, demanding payment of the dividend, F informed him that certain persons in Montreal were endeavouring to get payment of this dividend from him; but he neither mentioned who they were or the nature of their claim. In accordance with the practice of the Courts in Quebec, F made an affidavit of the position he occupied towards the principal debtor, in which he recited the above facts, but took no further action in the matter. He neither advised B that this declaration had been made, nor held any further communication with him. No opposition being offered, an order was made for the payment of the debt and costs by F within fifteen days, and without waiting for the expiration of this period, or giving B any notice, F paid the amount.

Held, affirming the judgment of the County Court, that B was entitled to recover the dividend from F; and that F could not protect himself on the ground that he had paid the money in obedience to the order of a Court of competent jurisdiction, as under section 125 of the Insolvent Act of 1875, the Court had no authority to make such an order after T's assignment; and even if that Court had possessed jurisdiction the judgment could not defeat B's rights, as he was not a party to the proceedings or affected with notice thereof, and F had been guilty of negligence in protecting himself. —*Re Fair and Bell*, 632.

9. *Insolvent Act of 1875, sec. 84 — Double proof.*]—W. carried on business separately and as a member of the firm of W. & S. The joint and several notes of W. & S. and W. were given to secure debts due by the firm, and shortly afterwards both W. & S. and W. made assignments in insolvency.

Held, reversing the decision of the County Court Judge, that under section 84 of the Insolvent Act of 1875, the holder of these notes was entitled to prove against the partnership estate for his claim, less the amount at which he valued the separate liability of W., and (the partnership not having assumed this liability) against W.'s estate for the full amount of the debt.

The rule against double proof in such cases was abrogated by sec. 60 of the Insolvent Act of 1869, which contained the same provisions as section 84 of the Act of 1875.

Re Dodge & Budd, 8 U. C. L. J. N. S. 51, commented on, but not followed.

Re Chaffey, 30 U. C. R. 64, distinguished.—*In re Harper Wilson—Carter v. Woodruff*, 151.

10. *Insolvent Act of 1875—Composition by member of insolvent firm —Contestation of deed of composition and discharge—Notice of objection under sec. 54.*]—The only composition which the Insolvent Act of 1875 provides for in the case of an insolvent firm is one extending to all the partners, and including both the creditors of the firm and of the individual members.

Where a deed of composition made by one of two insolvents provided for his release on payment of a composition by him to the creditors, and directed a re-transfer to him of the estate, it was held invalid.

It is not necessary under sec. 54, to give the insolvent notice of the facts upon which the objecting creditors intend to contest the confirmation of a deed of composition and discharge.—*Re Walker*, 265.

11. *Insolvent Act of 1875—Payment—Fraudulent preference—Sections 133 and 134.*—*Held*, that a payment by an insolvent in the ordinary course of business within thirty days before an assignment or the issue of a writ of attachment, is not void under section 134 of the Insolvent Act of 1875, unless the payee knows of the insolvent's inability to meet his engagements in full, or has probable cause for believing the same to exist.

Held, also, that a money payment not avoided under that section cannot be avoided under sec. 133 by shewing that it was made in contemplation of insolvency, and that it gave the debtor an unjust preference, as a payment in money does not come within that section.

Ex parte Simpson, 1 DeG. 9, distinguished.—*Smith v. Hutchinson*, 405.

12. *Insolvent Act of 1875, sec. 3, sub-sec. j., 130, 132, 133—Preference.*—A transfer of property by a debtor, which gives a creditor a preference over the other creditors is not necessarily void as one by which creditors are injured, obstructed, or delayed; and where such a preference was not made in contemplation of insolvency, and was not unjust, it was held valid.

The insolvent, six months before an attachment issued against him, conveyed his equity of redemption in certain lands to the defendant, upon trust to sell the same, and apply the proceeds, after payment of the mortgage, in payment of pre-existing

debts due to the defendant and one T., and to pay over the surplus, if any, to the insolvent. The insolvent had previously failed to effect a sale of the land for more than the mortgage debt. It did not appear clearly what other property the insolvent had at the date of the deed, or what other debts he owed. The estate, however, which came into the hands of the assignee consisted of a watch, while the claims proved amounted to \$277.80. The evidence did not shew that the deed was made in contemplation of insolvency.

The learned Judge at the trial found that there was no fraud or preference in the making of the deed, and that it was a *bonâ fide* transaction.

Held, reversing the judgment of the Common Pleas, 28 C. P. 132, that the deed was not void under sec. 130 or 132 of the Insolvent Act of 1875, as the evidence did not shew that the creditors were injured, obstructed, or delayed; nor under sec. 133, as it did not appear that it was an unjust preference, or made in contemplation of insolvency.

Semble, per PATTERSON, J. A., that even if the equity of redemption was in substance the whole of the insolvent's estate, the conveyance thereof was not an act of insolvency within sec. 3, sub-sec. j., inasmuch as the insolvent was not in trade at the time, and the equity of redemption was stock-in-trade. — *McEdwards, Assignee, v. Palmer*, 439.

See USE AND OCCUPATION.

BILLS AND NOTES.

Promissory note—Endorsement in blank—Stamps—Date—31 Vic. ch. 9, sec. 4, D.—37 Vic. ch. 47, sec. 2,

D.]—Defendant endorsed a promissory note, blank as to the amount, and without stamps, made by S. and C., dated 9th September, 1875, and payable to defendant or order. On the same day C. deposited it with the plaintiffs, authorizing them to fill it in for the amount of certain paper due, and to fall due before the 22nd October. On the 21st October the plaintiffs filled in the amount and affixed stamps sufficient to cover double duty, which were obliterated by writing across them the day on which they were affixed, namely, 21st October, 1875.

Held, affirming the judgment of the Common Pleas, 27 C. P. 320, that the stamps were not properly cancelled; for if affixed by the plaintiffs as agents of the maker, then under sec. 4 of 31 Vic. ch. 9, D., the date of the obliteration must accord with that of the note; and if the plaintiffs acted as subsequent holders, then under sec. 12, as substituted by 37 Vic. ch. 47, sec. 2, the initials or name as well as the date are required.

Seemle, per BURTON and PATTERSON, JJ.A., that the latter part of this substituted sec. 12, applies to bankers as well as other holders, and that the plaintiffs could have validated the note by affixing double stamps as soon as they became aware of the defect.

It was urged that the instrument only became a note on the 21st of October, when it was filled up; but, *Held*, that the "9th September" must be regarded as its date within the meaning of the statute.

After the note in this case had been double stamped, under 37 Vic. ch. 47, sec. 2, the plaintiffs applied for a new trial, or for a nonsuit, or for such other relief as it was competent for the Court to afford them.

It appeared that they acquired knowledge of the particular defect in the obliteration of the stamps during the argument in the Court below, but that no application to re-stamp the note had been made until after the judgment of that Court had been pronounced, when it was refused.

Held, that the plaintiffs were not entitled to relief, as the note had not been double stamped as soon as knowledge of the particular defect was acquired.

Seemle, that the judgment of the Court below on such a question is not appealable.—*La Banque Nationale v. Sparks*, 112.

See PRINCIPAL AND SURETY.—GUARANTEE.

BILLS OF SALE.

1. *Chattel mortgage—Description*—*R. S. O. ch. 119, sec. 23.*—*Held*, affirming the judgment of the County Court, that the words, "one single buggy," in a chattel mortgage, were not a sufficient description to satisfy *R. S. O. ch. 119, sec. 23.*—*Holt et al. v. Carmichael*, 639.

2. *Redemption—Possession by mortgagee—Mortgage—Statute of Limitations—Wild lands.*—In 1835 D. sold certain wild lands to S., who on the same day mortgaged them to him to secure payment of the purchase money in four years. S. sold and conveyed his equity of redemption to K. in 1838; and in 1842, default having been made under the mortgage, D. filed a bill of foreclosure against S., on which a final decree was obtained in 1845; but to this suit K., through some oversight, was not made a party. K. died in 1876, and in June of that year the plaintiff, his heir-at-law and

devisee, heard of K.'s claim on this land for the first time, and thereupon filed a bill to redeem. The defendants claimed under conveyances from D., made after the foreclosure.

It was proved that D. had gone over the land in 1839 or 1840, after his title had become absolute at law, to see if there were any trespassers upon it: that he then asked one H. to look after the land, and offered to sell it to him: that he sold to one S. in 1841, who frequently went upon the land and had it surveyed in 1853; and that the taxes had been paid by D. & S. and those claiming under them.

Held, on appeal from the decree of SPRAGGE, C., which was affirmed, 24 Gr. 213, that there was sufficient evidence of possession having been acquired by the mortgagee more than twenty years before the bill was filed, and that the plaintiff's right to redeem was barred.

Held, also, that where actual possession is once obtained by a mortgagee in assertion of his legal right of entry it need not be maintained continuously for twenty years.—*Kay v. Wilson*, 133.

See BANKRUPTCY AND INSOLVENCY, 3.

B. N. A. ACT.

See ASSESSMENT AND TAXES, 1.

CHATTEL MORTGAGE.

See BANKRUPTCY AND INSOLVENCY, 3—BILLS OF SALE.

COLLATERAL SECURITY.

See PRINCIPAL AND SURETY.

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COMPOSITION AND DISCHARGE.

See BANKRUPTCY AND INSOLVENCY, 1, 5, 10.

CONTRACT.

Mercantile contract—Construction of.—The construction of a mercantile contract is for the Court, unless it contains words of a technical or conventional use in the trade to which the contract relates. *Nordheimer v. Robinson*, 305.

See SALE OF GOODS—SPECIFIC PERFORMANCE.

CONSIDERATION,

See SPECIFIC PERFORMANCE.

CONTEMPT OF COURT.

Contempt of Court—Publication tending to influence result of election trial.—All the powers which the Court of Queen's Bench possessed with respect to controverted elections were transferred by 38 Vic. ch. 3, sec. 2, O., to the Court of Appeal, which has therefore now the power to punish for contempt in election cases.

Pending an election scrutiny the publisher of a paper at St. Catharines, where the scrutiny was being carried on, copied a letter which purported to have been written by the respondent to the "*Mail*" newspaper of Toronto, commenting very severely on the character and evidence of the petitioners' witnesses, as well as the motives of those prosecuting the petition. Upon a motion to commit the publisher for contempt of Court,

he filed an affidavit stating that the letter in question was an answer to an editorial which had appeared in the "*Globe*" newspaper charging the respondent with having improperly interfered with the voters' lists before the elections, and reflecting on his conduct in such a manner as to do him serious injury in St. Catharines where he lived; and that he, deponent, had altered the address of the letter to his own paper, and published the letter as a simple act of justice to, and without the knowledge or consent of, the respondent. He further denied any intention of giving offence to the Court, or of interfering with the fair trial of the case.

Held, that the publication contained expressions which amounted to a contempt of Court; but under the circumstances the Court refused to make any order against the publisher.

Remarks as to the liberty of comment allowed, and the duty of the Court in such cases.—*Re Lincoln Election*, 353.

CONVERSION.

See SALE OF GOODS, 2.

CONSTITUTIONAL LAW.

See ASSESSMENT AND TAXES, 1.

CONVEYANCE.

See BANKRUPTCY AND INSOLVENCY, 4.

COSTS.

See BANKRUPTCY AND INSOLVENCY, 1.

DEEDS.

See BANKRUPTCY AND INSOLVENCY, 4.

DIVISION COURT.

Abandonment of part of claim—Effect of.—*Held*, reversing the judgment of the County Court, that the commencement of a suit in the Division Court for part only of an entire claim, and endorsing an abandonment of the balance on the summons, is not *per se* a release of the excess; but the part so abandoned cannot be sued for after the recovery of judgment in such suit.—*Winger v. Sibbald et al.*, 610.

See EXECUTION.

DOWER.

See SALE OF LAND.

EASEMENT.

See SPECIFIC PERFORMANCE.

ELECTIONS.

See PARLIAMENT.

ENTRIES IN COURSE OF BUSINESS.

See EVIDENCE.

ESTOPPEL.

See SALE OF GOODS, 2.

EVIDENCE.

Evidence—Notes of deceased surveyor—Admissibility of.]—Notes of a survey made by a deceased surveyor in a book in which he kept a diary of matters, private and professional, were tendered in evidence to prove the boundary between lots 3 and 4. The entry of the survey was as follows: 6th June, 1827.—Got Mr. Ashbridge to shew the stake between Nos. 3 and 4, &c. And in another part of the book the following entry appeared:

June 15, 1827.—D. Bolton, Esq.	£2 16 3
At D. Bolton's house for fence	0 4 0
	£3 0 3pd.

There was no evidence that at or about the time of the survey Boulton had any interest in either lot 3 or 4; but it was shewn that he obtained a conveyance of lot 2 two months afterwards, and of lot 3 in 1830. Surveyors were not at that time under any obligation to make notes of surveys; and it was not proved that the entry was made contemporaneously with the transaction.

Held, reversing the judgment of the Queen's Bench, 39 U. C. R. 597, that the entry was not admissible as one made in the course of business, or in the performance of a *quasi* public duty.

Held, also, that the notes of the survey were not sufficiently connected with the entry of payment to be read with it as an entry against interest.

Per Moss, C. J. A., and HAGARTY, C. J. C. P., that the evidence would not have proved anything material to the controversy; and

Semble, per HAGARTY, C. J. C. P., that the evidence would not have affected the result, and that the better course, therefore, would have been, even if the Court thought the entries

admissible, to have refused a new trial for their rejection under sec. 34 of the A. J. Act, 1874.—*O'Connor et al. v. Dunn*, 247.

EXECUTION.

Exemption from seizure—Value of goods—Division Court bailiff—Notice of action—Jus tertii.]—The defendants, Division Court bailiffs, were sued for selling under executions a horse which the plaintiff claimed as exempt under 23 Vic. c. 25. The horse was sold for \$47.50; but the plaintiff swore that it was worth \$120, and the purchaser swore that he considered it worth \$90.

Held, reversing the judgment of the County Court, that the value of the horse was to be determined upon the whole evidence, and not only by the price it brought at the sale.

Held, also, following *Stephens v. Stapleton*, 40 U. C. R. 353, that the defendants were not entitled to a notice of action with the name and place of abode of the plaintiff endorsed thereon under C. S. U. C. c. 126, s. 10; a notice under section 193 of the Division Court Act being sufficient.

At the time of the seizure and sale the horse was included in a chattel mortgage given by the plaintiff to one M.: *Held*, that the defendants could not set up the right of the mortgagee as a defence.—*McMartin v. Hurlburt et al.*, 146.

EXEMPTION.

See EXECUTION.

FRAUDS, STATUTE OF.

See GUARANTEE.

GARNISHMENT.

See BANKRUPTCY AND INSOLVENCY, 8.

GUARANTEE.

Promissory note—Guarantee.—*Statute of Frauds*]—*Held*, affirming the judgment of the County Court, that a guarantee that a promissory note made by another will be paid at maturity is within the 4th section of the Statute of Frauds, and therefore invalid unless in writing.—*Wambold v. Foote et al*, 579.

HARBOURS.

See ACCRETION.

HIGHWAYS.

See ACCRETION.

HIRE RECEIPT.

See SALE OF GOODS, 2, 3.

INCOME.

See PARLIAMENT.

INFORMATION.

See MALICIOUS ARREST.

INSURANCE.

1. *Insurance—Existing insurance—Notice to agent of—Interim receipt.*]

—The plaintiff applied to effect an insurance in the defendants' company through one Suter, their local agent at Dundas, on certain machinery, for two months. In answer to the enquiry in the application respecting other insurances, he mentioned two existing policies, and informed Suter that there was another policy in the Gore Mutual, covering the building and machinery, but that he could not remember the amount which was on the machinery, and requested him to wait until he found the policy, as he was most anxious to have the correct amount stated in the application. Suter, however, through whom this policy had been effected as agent for the Gore Mutual, promised to ascertain the amount and fill it in before sending the application to the head office, whereupon the plaintiff signed it, and received an interim receipt which declared that unless followed by a policy within thirty days, the insurance should cease, and contained a foot note to the effect that any existing insurances must be notified at the issuing of the receipt, or the contract would be void. Suter forwarded the application, without having filled in the omitted particulars, to the board of directors at Toronto, by whom it was accepted; and in accordance with their practice where the risk only extended over a short period, instead of a formal policy, they issued a certificate which stated that the plaintiff was insured subject to all the conditions of defendants' policies, of which he admitted cognizance, and that in the event of loss it would be replaced by a policy. Suter had authority to receive appli-

cations, accept premiums, and issue interim receipts. The machinery was subsequently destroyed by fire, after the thirty days, but within the two months, and a policy was thereupon issued, endorsed with the ordinary conditions, one of which was that notices of all previous insurances should be given to the company and endorsed on the policy, or otherwise acknowledged by them in writing, or the policy should be of no effect; and another was, that all notices for any purpose must be in writing. The insurance in the Gore Mutual was not endorsed on the policy,

Held, reversing the decree of PROUDFOOT, V. C., 24 Gr. 299, PATTERSON, J. A., dissenting, that verbal notice to the agent was inoperative to bind the company; and that the plaintiff therefore was not entitled to have the policy reformed by the endorsement of the Gore Mutual policy thereon, and could not recover.

Held, also, that verbal notice to the agent of existing insurances was sufficient so far as the interim receipt was concerned.

Seem, per Moss, C. J. The plaintiff should not be permitted to sue upon a policy as a perfect and complete instrument entitling him to certain rights, and in the same action to say that it does not contain the real contract which he has made. *Billington v. Provincial Insurance Company* 158.

This judgment has been affirmed by the Supreme Court.

2. *Insurance—Misdescription of premises—Survey made by agent—Unreasonable condition—Further insurance—Mailing notice of—Presumption of receipt.*—The plaintiff, upon an application for insurance being read over to him, objected to

the distances stated in the diagram, which was endorsed on the application, of the contiguous buildings. The defendants' agent, who had prepared the diagram after a personal survey of the premises, promised to measure the distances and make the necessary alterations before sending it to the head office. The plaintiff thereupon signed the application, but the agent forwarded it without having made the corrections.

By one of the conditions of the policy it was provided that if an agent should fill up an application, he should be deemed to be the agent for that purpose of the insured and not of the company, "but the company will be responsible for all surveys made by their agents personally."

Held, affirming the judgment of the Common Pleas, 26 C. P. 380, that the diagram was a survey within the meaning of the above proviso, and that the company, therefore, and not the plaintiff, were responsible for its inaccuracy.

The proofs of loss did not comply with the conditions of the policy sued on, but they were in accordance with printed forms furnished to the plaintiff by the defendants' agent. The company received them on the 6th of August, and on the 11th of November informed the plaintiff that they had placed the matter in the hands of the Gore District Insurance Company for adjustment, "saving their rights at law"; but they took no objection to the sufficiency of the proofs until the trial. *Held*, that under the circumstances they were estopped from taking advantage of the defect.

Per BURTON, J. A., that the saving clause in defendants' letter referred to any objection to the claim itself and not to the preliminary proofs.

Per BURTON, J. A., that the fact that the agent had furnished the forms on which the proofs were made would not have bound the company, as he had no authority to supply forms for such a purpose.

The condition as to proof of loss required a certificate from the magistrate most contiguous to the place of fire: *Held*, that the condition was unjust and unreasonable, and therefore void, under sec. 33 of 36 Vic. ch. 44, O.

It was proved that the plaintiff had mailed the company a notice properly addressed of a further insurance, which the jury found they had received, and that they had not within two weeks thereafter notified the insured of their dissent. *Held*, that the notice must be presumed to have reached the company, as there was no evidence of its non-receipt; and that under 36 Vic. ch. 44, sec. 38, O., they must be deemed to have assented to it, no dissent having been signified by them within two weeks after the time when the notice would have been received in regular course.

In re Imperial Land Co. of Marseilles, L. R. 7 Ch App. 592, and *McCann v. Waterloo Ins. Co.*, 34 U. C. R. 381, distinguished.—*Shannon v. The Hastings Mutual Ins. Co.*, 81.

This judgment has been affirmed by the Supreme Court.

3. *Re-insurance — Misrepresentation.*]—The plaintiffs' agent re-insured the defendants, another insurance company, for a portion of their risk on property belonging to H. & Co., in November, 1875, being well acquainted with the property and every circumstance necessary to consider in deciding whether to accept or reject the risk. He renewed the insurance on the 10th March, 1876, at eight per cent., but swore that he

was induced to accept seven per cent. premium on the 25th April, owing to a misrepresentation by the defendants' agent that the defendants and the other insurance companies holding risks on the property had reduced their rate from eight to seven per cent.

Held, that such representation, if made, could form no ground for avoiding the policy, inasmuch as the plaintiffs had already accepted the risk on their own judgment of its nature, and the misrepresentation could only have had the effect of inducing them to take a lower premium.

One of the conditions of the policy was: "This re-insurance is subject the same specifications, terms, and conditions as policy No. 434,292 of the Northern which it re-insures; it being well understood that the Northern Insurance Company do not retain any sum or risk on the property covered by this policy, but retain an amount equal at least thereto on other parts" of the property. The defendants then held three policies on different portions of H. & Co.'s property, that which they re-insured in full with the plaintiffs for \$2,800, and two others for \$2,500 each.

It happened that before the fire occurred one of the defendants' policies for \$2,500 expired, so that at the time of the fire they only had a risk on the property of \$2,500, over and above their re-insurance. H. & Co. did not desire to renew the other policy, and defendants paid the whole \$2,500 on the policy in force, while the claim against the plaintiffs was only \$2,200.

Held, that the defendants had not violated the condition, as the effect of it merely was that they were not

to re-insure so as to reduce their own risk below the stipulated amount.

Held, also, that the difference in the rate of premium was not such a departure from the "specifications, terms, and conditions," of the defendants' policy as to vitiate the plaintiffs' policy.—*The Canada Fire Marine Ins. Co. v. The Northern Ins. Co. of Aberdeen and London*, 373.

4. *Insurance—Double insurance—Notice to agent—Estoppel.*]—A policy of insurance on a "Grist Mill" covers not only the building, but also the fixed and movable machinery in it.

The plaintiff effected an insurance in the defendants' company on a grist mill. He stated in his application that there were no other insurances on the property, although there was an existing insurance on the fixed and movable machinery in the mill.

Held, that the policy was void, as there was a double insurance on part of the property insured by the defendants, and that they were not estopped from setting up such further insurance by their agent's knowledge of it.

Per Moss, C. J. A. The true test of the plaintiff's right to recover was, whether he could have obtained a reformation of defendants' policy by confining it to the building alone; and this he could not have done, for the evidence shewed that it would then have been for an excessive amount, and a risk which defendants would not have accepted.—*Shannon v. The Gore District Mutual Ins. Co.*, 396.

INTEREST.

See TRUSTEES AND EXECUTORS.

INVESTMENT BY EXECUTOR.

See TRUSTEES AND EXECUTORS.

JURISDICTION.

See ASSESSMENT AND TAXES, 1.

JUSTICE OF THE PEACE.

See MALICIOUS ARREST.

LANDLORD AND TENANT.

See USE AND OCCUPATION.

LEASE.

See BANKRUPTCY AND INSOLVENCY, 6.

LETTERS.

See INSURANCE.

LIEN.

See BANKRUPTCY AND INSOLVENCY.

LIMITATIONS, STATUTE OF.

Mortgage—Action on covenant—38 Vic. ch. 16, sec. 11, O.—C. S. U. C. ch. 78.]—*Held*, reversing the judgment of MORRISON, J., 41 U. C. R. 567, that sec. 11 of 38 Vic., ch. 16, O., merely limits suits which directly affect the land or its proceeds to ten years; but an action on

a covenant in a mortgage for the payment of the mortgage money may still be brought within twenty years, under C. S. U. C. ch. 78.—*Allan v. McTavish*, 278.

MALICIOUS ARREST.

Malicious prosecution—unauthorized insertion of word “feloniously” in information.—In laying an information against the plaintiff, the defendant only intended to charge him with having unlawfully carried away a saw, and stated facts to the magistrate which merely amounted to a charge of trespass, but in drawing the information the magistrate of his own accord used the word “feloniously,” which word the defendant did not know the meaning of.

Held, reversing the decision of the County Court, that under these circumstances an action for malicious prosecution would not lie.

Remarks as to the proper course to pursue in drawing an information.—*Rogers v. Hassard*, 507.

MORTGAGE.

See PRINCIPAL AND SURETY—BILLS OF SALE, 2—LIMITATIONS, STATUTE OF.

NEGLIGENCE.

See RAILWAY COMPANIES.

NEW TRIAL.

See EVIDENCE.

NOTICE OF ACTION.

Mercantile contract—Construction of.—The notice of action stated the time of the trespass committed as “on or about the 28th of May,” and the place was described as “at or near the west half of lot 31.” The jury found that the seizure took place on the 23rd May; but the evidence shewed that it was only a technical seizure, and that the real cause of action was for the seizure on the 28th May, which was followed by the removal and sale. The jury also found that the trespass was committed on the east half of lot 32.

Held, that the notice was sufficient as reasonable certainty only is required, so as to identify the acts complained of, and prevent the defendant from being misled.—*Langford v. Kirkpatrick et al.*, 513.

PARLIAMENT.

1. *Revision of voters’ lists—Description of property therein—Addition of income voters—37 Vic. ch. 4, O.*—The duty of a Judge in revising the voters’ list under 37 Vic. ch. 4, O., only extends to correcting and varying it in respect of the qualification of those who are before him on the revision; and he has no authority to decide who is entitled to vote.

Upon a revision of the voters’ list under 37 Vic. ch. 4, O., the Judge, without making any order in accordance with section 11 of that Act, added certain names which were not on the assessment roll, and made no mention in the list of the property or income upon which they were rated.

Held, that the added list was a nullity.

Under 37 Vic. ch. 4, O., the Judge has no power to add to the voters' list in respect of income any persons who are not assessed for income in the last revised assessment roll.—*Re Lincoln Election*, 316.

2. *Voters' list*—*Description of the property*—32 Vic. ch. 21, O.]—The right of a voter, whose name has been entered on the voters' list, to exercise the franchise is not destroyed under the 32 Vic. ch. 21, secs. 5, 7, O., by the want of a sufficient or of any description of the real property on which his qualification depends. The provision requiring such description to be inserted is directory only, and does not make it essential to the right to vote; and this, notwithstanding the enactment in sub-section 3 of section 7, that the time therein mentioned should be directory only, the maxim *expressio unius, &c.*, not being applicable.

Per Moss, C. J. A.—The Interpretation Act, 31 Vic. ch. 1, sec. 6, sub-sec. 2, enacting that the word "shall" is to be construed as imperative, does not introduce any new rule, but is declaratory only of that established by judicial decision.

Per Moss, C. J. A.—The description must be accepted as sufficient where it is the same as that given in the assessment roll, as it was in this case.—*Re Lincoln Election*, 324.

See CONTEMPT OF COURT.

PARTNERSHIP.

1. *Partnership*—*Assignment by one partner of debts due to the firm*—35 Vic. s. 12, O.]—D. C., one of two partners, in consideration of \$100 paid to him, assigned to the

plaintiff a debt of \$118, due to the firm for goods sold to the defendant in the ordinary course of business, by a deed made and executed in his individual name, without his partner's knowledge, but by which he professed to transfer all debts due to the two partners, naming them, from the defendant. At the trial his partner swore that he considered himself bound by the assignment, and that he thought that D. C. had authority to make it.

Held, reversing the judgment of the County Court, that the assignment was within the scope of the partnership business, and covered by the agency of one partner for the other.

Held, also, that, even in the absence of implied authority, the subsequent ratification was sufficient.

Held, also, that the fact that the transfer was by deed did not deprive it of its effect as a written contract.—*Howell v. McFarland*, 31.

2. *Partnership*—*Jurisdiction of Court of Chancery*—*Declaratory decree*.]—Upon a bill filed by the plaintiff, as assignee of the firm of S. J. & Co., seeking to have the defendant declared a member of the firm, and to vest his property in the plaintiff, as such assignee, the Judge of the County Court of Brant, sitting for the Chancellor, made a decree as asked.

Objection to the jurisdiction of the Court of Chancery to entertain such a bill was taken for the first time in the reasons of appeal.

Held, varying the decree, that the Court of Chancery had jurisdiction under General order 538 to declare the defendant a partner, as upon proof of the partnership the plaintiff could have asked to have the partnership accounts taken; but that it

had no power to vest the defendant's property in the plaintiff.

Where there has been a contribution of capital as well as participation in the profits accruing from that capital, a partnership will be inferred, even though the parties have agreed that they will not call themselves partners, or did not intend to constitute that relationship.

Held, that the evidence, which is fully set out below, was sufficient to prove that the defendant was a partner of S. J. & Co.—*Botham v. Keefer*, 595.

PATENT FOR INVENTION.

Patent invention—New combination.—The bill was filed to restrain the infringement of a patent. The invention was described as an "improved chair for preventing bolts or nuts used in bracing and joining together iron rails from becoming loose or insecure." This was accomplished by introducing an iron chair between the rails and the sleeper at the joints of the rails, with a raised lip made of such a shape and depth as to be in "constant contact" with the nuts of the bolts after they were placed in position and firmly screwed to the fish-plates and the rails. The patentee claimed as his invention "the lipped chair in combination with the heads or nuts of bolts * * for retaining and preventing the nuts from becoming loose." It was proved that the lipped chair, the fish-plates, the nuts and bolts, had all been used in combination before the issue of the patent; and although not so used for the purposes of the patent, still that result was attained when the nuts happened to be of a larger size and came in contact with the lip.

Held, PATTERSON, J. A., dissenting, reversing the judgment of SPRAGGE, C., 24 Gr. 495, that although a most useful contrivance it could not be subject of a patent, as it was wanting in the element of invention.—*Yates v. Great Western R. W. Co.*, 226.

POST OFFICE.

See INSURANCE, 2.

PRACTICE IN APPEAL.

Power of Court of Appeal to correct entry on record.—In this case the learned Judge, who tried the case without a jury, really found a verdict for the defendant, as appeared from his notes, but a nonsuit was entered. The Court below made a rule absolute to enter a verdict for the plaintiff, although no leave was reserved, and no consent was given.

Held, that the Court of Appeal had power to correct the entry by the Judge's notes, or vary the rule. *McEdwards v. Palmer*, 439.

See SPECIFIC PERFORMANCE.

PRINCIPAL AND SURETY.

Promissory note—Discharge of indorser by giving time—Mortgage—Merger—Collateral security.—The plaintiffs took a mortgage from one M. to secure the payment of certain promissory notes made by him and endorsed to them by the defendant. The mortgage was subject to a proviso to be void on payment of \$4,300 with interest in one year, "the said sum of \$4,300 being represented by

certain promissory notes now under discount, and held by the said mortgagees, and any renewals or substitutions therefor that may hereafter be given for the same. All to be paid within one year from this date."

Held, affirming the judgment of the Queen's Bench, 40 U. C. R. 529, that there was no merger, and the mortgage was merely collateral security, and did not suspend any right of action on the notes.—*Molson's Bank v. McDonald*, 102.

RAILWAY COMPANIES.

R. W. Co. — Two lines crossing—Collision—Air brakes—Negligence—Statutory duty—Consol. Stat. C. ch. 66, sec. 143.—The plaintiff, a conductor of a Grand Trunk Railway train, was injured while his train was crossing the track of the defendants' railway on a level by the defendants' train running into it. On approaching the crossing, the defendants attempted to stop their train by the air brakes, but, owing to the bursting of a tube they failed to act, and although every effort was made to stop the train with the hand brakes and by reversing the engine, a collision occurred. It was shewn that these brakes were the best known appliance for stopping trains: that they were in common use on railways: that they had been properly examined and tested during the day; and that the defect arose from no want of care on the part of the defendants.

Sec. 143 Consol. Stat. C., ch. 66, enacts that "every locomotive * * or train of cars on any railway shall, before it crosses the track of any other railway on a level, be stopped for at least the space of three minutes."

Held, Moss, J. A., dissenting, affirming the judgment of the Queen's Bench, 40 U. C. R. 333, that the plaintiff was entitled to recover.

Per HAGARTY, C. J. C. P., and GALT, J.—The statute imposed an absolute duty on the defendants to stop for three minutes, and that their omission to do so rendered them liable to the plaintiff, unless it was shewn to have been caused by the act of God or inevitable necessity.

Per PATTERSON, J. A.—The defendants were guilty of negligence in not applying the air brakes at a sufficient distance from the crossing to enable the train to be stopped by other means in case of these brakes giving way.

Per Moss, J. A.—There was no evidence of negligence, as the defendants had provided their train with the best known description of brakes, and used them with care, and they were under no obligation to have hand brakes at all.

Quere, per Moss, J. A., whether it was open to the plaintiff to rely upon the breach of the statutory duty, having based his action on negligence, and the only issue on the pleadings being, whether the defendants were guilty of negligence. *Quere*, also, whether the plaintiff could complain of defendants' neglect of the statutory duty if, as might be inferred from the evidence, he, being a conductor of the other train, had also neglected it.—*Brown v. Great Western R. W. Co.*, 64.

This judgment has been affirmed by the Supreme Court.

RECEIPT.

See SALE OF GOODS, 2.

REFORMATION OF DEED.

See INSURANCE, 3.

SALE OF GOODS.

1. *Sale of goods—Acceptance—Rescission—Stoppage in transitu.*]

The plaintiffs, merchants in New York, sold to E. B. & Co., merchants in Toronto, through the intervention of a broker, one O., 50 bags of coffee, on the 4th January, 1876, at sixty days' credit. The coffee was selected by O., after full opportunity of inspection and examination, and was sent by rail to Toronto, at the risk of E. B. & Co., who paid the freight thereon, and, on arrival of the goods, entered and bonded them in their name. Upon examination E. B. & Co. ascertained that, with the exception of fifteen bags, the coffee was badly stained with some chemical substance, and, on the 17th January, informed O. that it was unmerchantable, and asked him to see the sellers and let them know what to do, as they could not use it. O. replied that the plaintiffs repudiated all liability, but he suggested an experiment to get rid of the damage, and requested them to telegraph him if they could use the goods at $\frac{1}{2}$ per cent. per pound allowance, offering to endeavour to induce the plaintiff to make that reduction. E. B. & Co. replied that there could be no doubt the damage was an old one, but that they would call in a coffee roaster to inspect it, and if anything could be done they would communicate without delay. On the 7th February, and before O.'s suggestion was acted upon, E. B. & Co. made an assignment in insolvency to the defendant, having in the meantime sold 23 bags of the coffee, 15 before and 8 after the objection had been made to it.

Held, reversing the judgment of the Queen's Bench, 41 U. C. R. 136, that the selection of the goods

by O., acting either for E. B. & Co., or for both parties, passed the property to E. B. & Co., and that they could not reject it after a full and fair opportunity of inspection by their agent.

Held, also, that even if E. B. & Co. had been at liberty to rescind the contract on ascertaining that a portion of the goods were unmerchantable, they had precluded themselves from so doing by the mode in which they had dealt with them.

Held, also, that even if the correspondence with O. had taken place with the plaintiffs, there was no evidence of a mutual rescission of the contract.

Held, also, following *Wiley v. Smith*, 1 App. R. 179, that the *transitus* was at an end; and that the right to stop being once lost could not be revived by a subsequent refusal of the consignee to accept a portion of the goods.—*Wilds et al. v. Smith*, 8.

This decision has since been affirmed by the Supreme Court: 2 Sup. R. 1.

2. *Hire-receipt—Property passing—Estoppel.*]

The plaintiffs sold to one R. an organ on credit, and received from him a conditional hire-receipt, which acknowledged the receipt of an organ on hire. It contained a stipulation that the signer might purchase the organ for \$130, payable in two equal instalments on the 1st of February, 1875, and the 1st of February, 1876, with interest; and it provided that it should remain the plaintiffs' property on hire until fully paid for, and that they might resume possession on default, although a part of the purchase money might have been paid or a note or notes given on account thereof. This receipt, and a note dated the 17th of February, 1874, payable four months

after date, were signed by R. Some days afterwards it was discovered that the receipt bore no date, whereupon the plaintiffs' bookkeeper filled in the 25th February, 1874, the day on which the receipt and note were received by the plaintiffs. The plaintiffs discounted the note with their bankers, and at maturity obtained a renewal and returned it to R. The first instalment was paid, and renewals in whole or in part were given until September, 1875. In May, 1876, R. transferred the organ to G. & B. as security for a debt. He represented that he had paid the purchase money, and produced as evidence the note of February 17th, 1874, which had been returned to him on its renewal, and they acted upon this misstatement. The note bore marks of having been discounted, but there was nothing to connect it with the organ. While the organ was in the possession of J. W. B., it was seized by the plaintiffs' agent, and removed to the express office, from which it was taken by G. B., the other defendant, under J. W. B.'s direction, and carried back to the house in which they both lived. Subsequently J. W. B. sold the instrument to G. B.

The learned Judge of the County Court held that the plaintiffs enabled R., by leaving the organ in his possession after default, and leaving the note in his hands with their names on it, to assume the appearance of ownership: that the defendants were thereby induced to take the organ; and that the plaintiffs were estopped from claiming it as against them.

Held, reversing this judgment, that the plaintiffs were not estopped, for there was no representation by the plaintiffs, and no neglect of any duty owing to the defendants.

Held, also, that there was ample evidence of a joint conversion.

Held, also, that the discounting of the note was not a waiver of the plaintiffs' right of property.

Semble, per Moss, C. J. A., that the insertion of the date in the receipt was an immaterial alteration. — *Mason et al. v. John W. Bickle and George Bickle*, 291.

3. *Hire receipt—Construction of—Functions of Judge.*] — The defendant, wishing to buy an organ from the plaintiff, signed a conditional hire-receipt which gave him the right of purchasing the organ for \$129, payable as follows: a cash payment of \$50, and the balance with interest in one year from date; and it stipulated that the instrument should remain the plaintiff's property on hire at \$4 a month until it was fully paid for. The defendant paid the \$50 and obtained the instrument. At the end of the year he was granted an extension of time for the payment of the balance, which was followed by similar indulgences, until at last, being pressed for payment, he offered to pay \$50 cash and give his note for the remainder in four months. The agent communicated this offer to the plaintiff, who replied, "As we require this matter *closed up*, you can accept the \$50, provided he gives at same time a note for balance at four months with interest." The letter also requested him to obtain the hire-receipt, which had been sent to the defendant by mistake. The defendant paid \$50, sent back the hire-receipt, and gave the note as required, and received a receipt for it, "being balance of account for organ." The note was not paid at maturity, and the plaintiff replevied the organ.

The County Court Judge left it

to the jury to say whether the note was taken conditionally or on account, or was a settlement of the balance due, so that from thenceforth the organ was to be the defendants.

Held, reversing the judgment, that the construction of the contract was for the Court; and that there was no evidence that the note was given in satisfaction of the unpaid residue of the purchase money.

The mere taking of a note for the purpose of closing an account is not proof that it was taken in payment. — *Nordheimer v. Robinson*, 305.

SALE OF LAND.

Deed — Investigation of title — Dower.]—On a sale of land, the deed and mortgage back were executed by the vendor and purchaser, and left with an attorney until their respective wives should come in and bar their dower; but nothing was said as to title. The defendant went into possession of the land, improved it, and made a payment on the mortgage, but raised no objection to the title until he discovered, upon endeavouring to raise money on the land four years after he had gone into possession, that there was a mortgage on it sixteen years old, which had not been foreclosed.

Held, varying the judgment of the Common Pleas, 28 C. P. 203, though upon a ground not taken there, that the defendant was entitled to have a release of the dower; but that he had waived his right to have an unlimited inquiry as to title. — *O'Connor et al v. Beatty*, 497.

SPECIFIC PERFORMANCE.

Easement—Specific performance—Evidence.]—An agreement to grant

an easement will not necessarily be for an easement in perpetuity.

Specific performance of an agreement to grant an easement may be enforced in equity.

A verbal agreement was entered into between the owners of two adjoining half lots, that each should give a strip of equal width from his land for a lane from the public highway to the clearing, which they should make upon their respective lots, the agreement not being expressly limited as to time. A rail fence accordingly was built by each on their respective sides of the lane, which they used in common for fifteen years, until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greatest part of the lane was on the defendant's land; and that there had been no expenditure on the plaintiff's land, or on the lane upon the faith of this agreement.

Held, reversing the decree of Proudfoot, V. C., 24 Gr. 573, that specific performance could not be enforced, as the site of the fence and the user of the included land could not be referable to the original agreement; but even if the lane had been formed of equal portions of the land of each party, no agreement to keep it open in perpetuity could, under the circumstances, be presumed.

Quære, whether the defendant's agreement could properly be said to be founded upon a valuable consideration.

Leave to adduce further evidence refused, where the expense would be wholly disproportionate to the value of the subject matter in litigation. — *Craig et al. v. Craig*, 583.

STATUTE OF FRAUDS.

See GUARANTEE.

STAMPS.

See BILLS OF EXCHANGE AND PROMISSORY NOTES.

STOPPAGE IN TRANSITU.

See SALE OF GOODS, 1.

SURVEYOR.

See EVIDENCE.

TITLE.

See SALE OF LAND.

TROVER.

See SALE OF GOODS, 2.

TRUSTEES AND EXECUTORS.

Trustee and cestui que trust—Acquiescence in breach of trust—Interest—Annual rests.—A *cestui que trust* will not be estopped from objecting to the amount of the trust fund, on the ground of acquiescence, merely because he did not dispute its correctness while his interest was reversionary; especially where, as in this case, he was not in possession of all the material facts, and his interest was not vested.

The principle upon which the Court acts in charging executors with interest, is not that of punishment, but of compensating the *cestui*

que trust, and depriving the trustee of the advantage he has wrongfully obtained.

An executor will not necessarily be charged with compound interest in all cases, except those in which there is a mere neglect to invest.

Where an executor retained a portion of the trust money under the belief that it was his own, and had acted on that supposition for many years, without objection from those interested under the will, and it did not appear that he had used the money in trade.

Held, reversing the decree of BLAKE, V. C., that under the circumstances he was only chargeable with simple interest. — *Inglis v. Beaty*, 453.

USE AND OCCUPATION.

Insolvency—Use and occupation—Action for.—The plaintiff sued the defendant for the use and occupation of a store from the 1st of April to the 1st of July, 1875. The defendant had made an assignment under the Insolvent Act of 1869, on the 20th of April, but the assignee only occupied the shop while removing the goods to another store which the defendant owned, when he returned the key to the defendant. On the 1st of May a deed of composition and discharge was executed, which directed the assignee to deliver up and convey the estate to the insolvent upon its confirmation. The deed was confirmed on the 14th June, when the defendant was allowed to continue on his own account the business which, since his assignment, he had nominally conducted on behalf of the assignee; but no written re-conveyance was ever made. It

was proved, however, that people who wished to see the store applied to the defendant and were shewn over it by his son: that the plaintiff's agent had recognized the defendant as having possession by sending people who inquired about the shop to him as being the person who had it to dispose of: that the defendant had claimed the fixtures in the shop as part of the assets that reverted back to him in consequence of the deed of confirmation, and had tried to dispose of them to an incoming tenant. The plaintiff resumed possession on the 1st of July.

Held, reversing the judgment of the County Court, that the action for use and occupation would lie against the defendant, notwithstanding the assignment, as the evidence shewed an occupation with the mutual recognition of the plaintiff as landlord and the defendant as tenant; and a sufficient transfer from the assignee to the defendant.—*Blackburn v. Lawson*, 215.

VOTERS' LISTS.

See PARLIAMENT.

WAIVER.

See SALE OF GOODS, 2.

WATERS.

See ACCRETION.

WAYS.

See ACCRETION.

WHARF.

See ACCRETIONS.

WILL.

Will — Construction of — Vested estate.]—The testator, in the event of there being issue of the marriage of himself and his wife, devised half of his estate to such issue; if a son, on his attaining the age of twenty-five years; if a daughter, on her attaining the age of twenty-one years or marriage, "and in the event of there being no such issue * * *born or if born not living within one year from my decease,*" then over.

A few weeks after the testator's death his wife had a son, who lived only a few days.

Held, affirming the judgment of SPRAGGE, C., that the gift over must take effect, as there was no child living at the end of the year.

Per PATTERSON, J. A., upon the true construction of the will, which is set out below, the legacy was vested in the son, subject to be divested upon the happening of the event in question.—*Wilson v. Beatty*, 417.

WORDS.

See INSURANCE, 4.

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